Office - Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

82-38

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. PELCYGER
FREDERICKS & PELCYGER
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683

MICHAEL R. THORP
EISENHOWER, CARLSON, NEWLANDS, REHA, HENRIOT & QUINN
1200 First Interstate Plaza
Tacoma, Washington 98402
(206) 572-4500

SCOTT B. MCELROY
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for Cross-Petitioner Pyramid Lake Paiute Tribe of Indians

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Pyramid Lake Paiute Tribe of Indians is barred from asserting its claimed reserved right to Truckee River water for fishery purposes by the res judicata effect of the 1944 decree in a suit quieting title to Truckee River water rights in Nevada even though:

a) The Tribe was not a party to the prior suit;

b) The United States purported to represent the interests of both the Pyramid Lake Reservation and the Newlands Reclamation Project in the prior suit and the assertion of the water right for fishery purposes would have conflicted with the water rights sought for the Newlands Project;

c) The Tribe's claimed water right for fishery purposes was not actually litigated in the prior suit;

d) The government's attorneys did not believe that the Tribe's water right for fishery purposes was placed at issue in the prior suit; and

e) The water right for fishery purposes requires proof of different facts than the Tribe's agricultural water right that was actually litigated in the prior suit.

LIST OF PARTIES

The United States was plaintiff-appellant below. The Pyramid Lake Paiute Tribe of Indians was plaintiff-intervenor-appellant. Defendants-appellees were the Truckee-Carson Irrigation District, the State of Nevada, the Sierra Pacific Power Company, the Cities of Reno and Sparks, Washoe County, and approximately 17,000 individually named persons, firms, partnerships, and corporations who have, or claim, rights to use the waters of the Truckee River or its tributaries in the State of Nevada. The Truckee-Carson Irrigation District appeared in its own right and, with others, as class representatives of approximately 4,000 water users in the Newlands Reclamation Project. *See United States v. Truckee-Carson Irrigation District*, 71 FRD 10 (D. Nev. 1975).

Nevada has filed with the Clerk of the Court a list of the approximately 17,000 defendants in this case. Nev. Pet. No. 81-2245 at ii n.*.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL PROVISION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE CROSS-PETITION	9
I. The Arguments Raised by the Cross-Petition Are Encompassed within the Petitions But Would, If Adopted, Enlarge the Relief Granted by the Court of Appeals	9
II. The Lower Court's Due Process Analysis Conflicts with Numerous Decisions of this Court	10
III. The Tribe's Fishery Water Right Was Not Part of the Government's *Orr Ditch* Cause of Action	15
IV. The Res Judicata Defense Is Not Available to Non-*Orr Ditch* Parties	18
CONCLUSION	19
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Andrus v. Idaho, 445 U.S. 715 (1980)	10
Armstrong v. Manzo, 380 U.S. 545 (1965)	11
Barry v. Barchi, 443 U.S. 55 (1979)	11
Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971)	10, 16
California v. United States, 438 U.S. 645 (1978)	7
Cappaert v. United States, 426 U.S. 128 (1976)	3
Cromwell v. County of Sac, 94 U.S. 351 (1877)	18
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977)	9
Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93 (S.D. N.Y. 1972)	13
Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)	12, 14
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)	13
Glasser v. United States, 315 U.S. 60 (1942)	13
Greene v. United States, 376 U.S. 149 (1964)	16
Griffin v. Griffin, 327 U.S. 220 (1946)	11
Hankerson v. North Carolina, 432 U.S. 233 (1977)	9
Hansberry v. Lee, 311 U.S. 32 (1940)	*passim*
Hanson v. Denckla, 357 U.S. 235 (1958)	11
Heckman v. United States, 224 U.S. 413 (1912)	14
Holloway v. Arkansas, 435 U.S. 475 (1978)	12
Ickes v. Fox, 300 U.S. 82 (1937)	14
Lugar v. Edmundson Oil Co., —— U.S. —— (No. 80-1730, June 25, 1982)	13
Menendez v. Saks and Co., 485 F.2d 1355 (2d Cir. 1973)	10
Montana v. United States, 440 U.S. 147 (1979)	18
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	11, 12, 16
New Jersey v. New York, 345 U.S. 369 (1953)	12
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	18
Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464 (1918)	11

TABLE OF AUTHORITIES—Continued

	Page
Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980)	9
Schroeder v. City of New York, 371 U.S. 208 (1962)	11
Schweiker v. Hansen, 450 U.S. 785 (1981)	14
Standefer v. United States, 447 U.S. 10 (1980)	10
Union Pacific Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913)	16-17
United States v. Interstate Commerce Commission, 337 U.S. 426 (1949)	16
United States v. Johnson, 319 U.S. 302 (1943)	16
United States v. Nevada, 412 U.S. 534 (1973)	6
United States v. Nixon, 418 U.S. 683 (1974)	16
United States v. Orr Ditch Water Company, Equity No. A-3 (D. Nev.)	*passim*
United States v. Sturgeon, 27 Fed. Cas. 1357 (D. Nev. 1879), *aff'd*, 27 Fed. Cas. 1358 (9th Cir. 1879)	3
United States v. The Haytian Republic, 154 U.S. 118 (1891)	15
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	17
Von Moltke v. Gillies, 332 U.S. 708 (1948)	12
Walker v. City of Hutchinson, 352 U.S. 112 (1956)	11
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)	9
Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)	12
Winters v. United States, 207 U.S. 564 (1908)	3, 14
Wood v. Georgia, 450 U.S. 261 (1981)	12, 13
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	11, 17
CONSTITUTION, STATUTES, AND REGULATIONS:	
United States Constitution, Amend. V	3, 10
United States Constitution, Amend. XIV	10
25 U.S.C. § 175	14

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. § 194	12
28 U.S.C. § 1345	6
43 U.S.C. § 371 *et seq.*, 32 Stat. 388	4
43 U.S.C. § 372	7, 14
43 U.S.C. § 419	14
43 U.S.C. § 461	14
43 U.S.C. § 498	14
43 U.S.C. § 614c	6
Rule 8(3), Fed. R. Civ. P.	12
Rule 23(a), Fed. R. Civ. P.	14
TREATISES:	
2 *Freeman on Judgments* § 874 (5th ed. 1925)	17
1B *Moore's Federal Practice* ¶ 0.410[1] (2d ed. 1980)	16
3B *Moore's Federal Practice* ¶ 23.70 (2d ed. 1980)	14
Restatement of Judgments § 61 (1942)	16
Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973)	16
Restatement (Second) of Judgments § 61.2(1)(c), (d) (Tent. Draft No. 1, 1973)	16
Restatement (Second) of Judgments § 86 (Comment f (Tent. Draft No. 2, 1975)	14
Restatement (Second) of Judgments § 86(d) (Tent. Draft No. 2, 1975)	13
Restatement (Second) of Judgments § 86(e) (Tent. Draft No. 2, 1975)	13
6 *Waters and Water Rights* Chapts. 28, 29 (R. Clark ed. 1972)	17
6 *Waters and Water Rights* § 513.2 (R. Clark ed. 1972)	17
16 Wright, Miller, Cooper & Gressman *Federal Practice and Procedure: Jurisdiction* § 4004 (1977)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT[1]

OPINIONS BELOW

The district court's February 5, 1975 decision ordering a separate trial on the affirmative defenses of res judicata and collateral estoppel and granting the United

---

[1] Petitions for writs of certiorari to review the same decision have been filed by the State of Nevada, No. 81-2245, and by the Truckee-Carson Irrigation District (TCID), No. 81-2276. Both petitioners filed separately bound Appendices pursuant to Supreme Court Rule 21.1(k). Cross-Petitioner Pyramid Lake Paiute Tribe of Indians adopts those Appendices for purposes of tnis Cross-Petition. Unless otherwise noted, all references in this Cross-Petition will be to the Appendix filed by TCID in No. 81-2276. Such references will be indicated simply by the page number of that Appendix, *e.g.*, "A-15." Nevada's Appendix in No. 81-2245 will be cited as "Nev. App."

Supplemental materials that constitute part of the record in this case to which reference is made in this Cross-Petition are included in the Appendix to this Cross-Petition. That Appendix will be cited as "Tribe App."

States' Motion to Certify the Class composed of the water users on the Newlands Reclamation Project is reported at 71 FRD 10 (D. Nev. 1975). The district court's December 12, 1977 Memorandum Decision, Findings of Fact and Conclusions of Law, Certificate under Rule 54(b) Fed. R. Civ. P. and 28 U.S.C. § 1292(b), and Stay of Further Proceedings and Judgment are not reported. They are reproduced in Nev. App. at 161a-196a, and are partially reproduced at A-72 to A-110.[2]

The June 15, 1981 Opinion of the Court of Appeals for the Ninth Circuit, as amended by its July 10, 1981 Order, is reported at 649 F.2d 1286. It is reproduced in its unamended form in Nev. App. at 197a-253a and in its amended form at A-1 to A-65. The July 10, 1981 Order is reproduced in Nev. App. at 254a-255a. The Ninth Circuit's January 5, 1982 Order amending its prior opinion is reported at 666 F.2d 351, and is reproduced in Nev. App. at 256a-259a, and at A-66 to A-69. The Ninth Circuit's March 11, 1982 Order denying petitions for rehearing and rejecting a suggestion for rehearing en banc is not reported. It is reproduced in Nev. App. at 260a-261a, and at A-70 to A-71.

JURISDICTION

The Court of Appeals' decision was issued on June 15, 1981. It was subsequently modified by Orders dated July 10, 1981, and January 5, 1982. Petitions for Rehearing were denied and a Suggestion for Rehearing En Banc was rejected by Order dated March 11, 1982.

This Cross-Petition is filed pursuant to Supreme Court Rule 19.5. Nevada's Petition for Certiorari, No. 81-2245, was received on June 9, 1982. TCID's Petition for Certiorari, No. 81-2276, was received on June 11, 1982.

---

[2] TCID's Appendix omits the district court's Judgment and Certificate under Rule 54(b) Fed. R. Civ. P. and 28 U.S.C. § 1292(b) and Stay of Further Proceedings which are reproduced in Nev. App. at 193a-196a.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

This suit was brought by the United States, and joined by the Pyramid Lake Paiute Tribe of Indians, to establish their right to the water necessary to maintain and preserve the Pyramid Lake and Truckee River fisheries. Water is sought for two related uses: for flows in the Truckee River for natural reproduction of the lake's two principal fish, the Lahontan cutthroat trout and the cui-ui, and for Truckee River inflows to maintain the level of the lake and the quality of its waters on a long-term basis. The Tribe and the United States contend that water for this fishery purpose was reserved when the Pyramid Lake Indian Reservation was set aside in 1859. *See Winters v. United States*, 207 U.S. 564 (1908); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. Sturgeon*, 27 Fed. Cas. 1357 (D. Nev. 1879), *aff'd*, 27 Fed. Cas. 1358 (9th Cir. 1879).

Pyramid Lake and its once world famous fishery are the heart and soul of the Pyramid Lake Indian Reservation and have provided the sustenance and the livelihood of the members of the Pyramid Lake Paiute Tribe of Indians since time immemorial. The Truckee River is the lake's lifeline. One of the purposes for establishing the Pyramid Lake Indian Reservation, which includes all of Pyramid Lake and the lower 20 miles of the Truckee River, was "to provide the Indians with access to Pyramid Lake and at least the lower reaches of the Truckee River in order that they might obtain their sustenance,

at least in part, from these historic fisheries." A-3 to A-4, A-10 to A-14, A-97 to A-99.

Owing primarily to the diversion of "almost the whole volume of the Truckee River" to the Newlands Reclamation Project, which was authorized pursuant to the federal Reclamation Act of 1902, 43 U.S.C. 371 *et seq.*, 32 Stat. 388, the Pyramid Lake fishery has been virtually destroyed. The Lahontan cutthroat trout, which once grew to more than 40 pounds in Pyramid Lake, is currently classified as a threatened species; the cui-ui, which is found only in Pyramid Lake, is listed as an endangered species. A-2 to A-4, A-10 to A-14.

In 1913, the United States initiated a suit to quiet title to Truckee River water rights in Nevada, *United States v. Orr Water Ditch Company*, Equity No. A-3 (D. Nev.), hereafter *"Orr Ditch."* Trial took place between 1919 and 1921, and the final decree was entered in 1944. A-9, A-15. "[T]he primary purpose of *Orr Ditch* was to secure the water rights for the [Newlands] reclamation project." A-75. *See also*, A-99. The United States sought and obtained the largest possible water right for the Newlands Project, A-4 to A-9, A-14 to A-15, A-233 to A-234, but limited its claims on behalf of the Pyramid Lake Indian Reservation to relatively small irrigation rights that would not conflict with the rights claimed for the Newlands Project. A-2, A-7 to A-13, A-53 to A-54, A-77 to A-79, A-101 to A-102, A-104 to A-105. A water right to fulfill the fishery purpose of the Pyramid Lake Indian Reservation was not actually asserted or litigated during the course of the *Orr Ditch* proceedings. A-2, A-55, A-104.

Throughout the *Orr Ditch* proceedings, the United States purported to represent the interests of both the Pyramid Lake Indians and the Newlands Project's water users. A-51 to A-52. The Tribe did not participate in the *Orr Ditch* litigation. It was not consulted by government officials responsible for its prosecution, and was

not asked to, and did not, approve the final stipulated decree. 24 Tr. 4483, 25 Tr. 4704-05, 4710-11, 42 Tr. 8553-54, 43 Tr. 8792, Tribe App. at 1a-3a. Newlands Project water users retained attorneys who participated in the negotiations that led to the Truckee River Agreement,[3] but they were never joined as parties, and the United States "never relinquished or limited its representation of the Project's interests." A-55.

Government officials were aware of the potential claim of a water right to maintain and preserve the Tribe's Pyramid Lake and Truckee River fisheries. No such claim was asserted in the *Orr Ditch* litigation, however, because of "the larger interests involved in the proposition, having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." A-10 to A-13, A-52 to A-55, A-72 to A-79, A-92 to A-93, A-100, A102, A-104, A-105 to A-106.

The government attorneys responsible for handling the *Orr Ditch* litigation expressly stated their understanding that the Tribe's water right for fishery purposes was not involved in the suit because:

> nothing is said about fish or water to be used for fish passing up and down the stream [in the bill of complaint and] nothing is said about this subject in any pleadings, nor was any testimony taken or any suggestions made from the beginning of the case down to the present time regarding fish.

A-12. At one time, however, the *Orr Ditch* court was apprised of the conflict between the water needs of the Pyramid Lake fishery and diversions to the Newlands Reclamation Project by a government official employed

---

[3] The Truckee River Agreement was incorporated in the *Orr Ditch* Final Decree, but neither the Agreement nor the Decree addressed the Tribe's water right for fishery purposes that is claimed in this suit. *See*, A-14 to A-15.

by the Bureau of Indian Affairs. Ex. A-408, Tribe App. at 4a-5a.

Owing to insufficient Truckee River inflow, Pyramid Lakes' Lahontan cutthroat trout population was destroyed by the early 1940's. The cui-ui barely survived. Restoration efforts for the trout began almost immediately. A-2, A-10 to A-14. A successful stocking program initiated by the State of Nevada eventually led to the enactment of Section 4 of the Washoe Project Act of 1956, 43 U.S.C. § 614c, which mandates restoration of the Pyramid Lake fishery. A-14, A-57 to A-58. In 1976, the United States completed construction of the Marble Bluff Dam and Fishway which enable the trout and the cui-ui to bypass the delta at the mouth of the Truckee River and to ascend to their spawning grounds. A-14. These restoration efforts combined with an extensive hatchery stocking program for the trout "appear to justify optimism for eventual success." A-14, A-98 to A-99.

In 1972, the United States initiated an original action in this Court against the States of Nevada and California to establish the Tribe's water right for fishery purposes. The government's Motion for Leave to file its Complaint was denied without prejudice because of the availability of relief in the federal district courts. *United States v. Nevada*, 412 U.S. 534 (1973).

In 1973, the United States filed a complaint in Nevada federal district court pursuant to 28 U.S.C. § 1345 alleging, *inter alia*, that in establishing the Pyramid Lake Reservation in 1859 there was reserved for the Tribe's benefit sufficient Truckee River water for the maintenance and preservation of the Pyramid Lake and Truckee River fisheries. The Pyramid Lake Tribe intervened as a plaintiff. The defendants consisted of all adverse claimants to the waters of the Truckee River and its tributaries in Nevada, including the class consisting of all water users within the Newlands Reclamation Project. Over the objections of the Tribe and the

United States, the district court bifurcated the case and limited the initial trial to the issues of res judicata and collateral estoppel. A-2 to A-3, A-16 to A-17; 71 FRD 10.

The district court found that the claimed water right for fishery purposes had not actually been litigated in the *Orr Ditch* litigation. Accordingly, the collateral estoppel defense was rejected. A-104, A-108.[4] Although recognizing the fishery purpose of the Pyramid Lake Reservation, A-97 to A-98, the district court dismissed the Tribe's complaint with prejudice. It also dismissed all of the government's complaint except for the causes of action for water rights not having to do with Pyramid Lake. "[P]rimary reliance [was] place[d] upon passage of the 1902 Reclamation Act." A-73. *See also*, A-17 to A-18, A-20 to A-21. That Act was held to have authorized the extinguishment of the Tribe's fishery water right for the benefit of the Newlands Reclamation Project, and the Secretary of the Interior was said to have exercised that authority by not asserting that right in the *Orr Ditch* litigation. A-72 to A-79, A-92 to A-93, A-100, A-102, A-105. Accordingly, the district court ruled that the United States did not have a "prohibited" or "impermissible" conflict of interest in the *Orr Ditch* case. The Tribe and the United States were held barred from litigating the fishery water right which was found to have been a relinquished part of the government's *Orr Ditch* cause of action. A-104, A-105 to A-106, A-108.

The court of appeals affirmed in part, reversed in part, and remanded the case for trial. It overturned the district court's reliance on the Reclamation Act, holding that Section 8 of that law, 43 U.S.C. § 372, as construed in *California v. United States*, 438 U.S. 645 (1978), prevents the Secretary from extinguishing Indian water rights for the benefit of reclamation projects.

---

[4] No appeal was taken from this determination.

A-21 to A-29. Nor was the Tribe's water right extinguished by congressional ratification subsequent to *Orr Ditch*. A-57 to A-58.[5]

On res judicata, the court of appeals first affirmed the district court's holding that the fishery water right was encompassed in the government's *Orr Ditch* cause of action. A-31 to A-34. Then the court reviewed the Tribe's contention that preclusion of its claimed fishery water right would result in a denial of procedural due process owing to the government's inadequate and improper representation of the Tribe's interests in the *Orr Ditch* litigation. A-34 to A-50. It ruled that the Tribe is entitled to due process protection, A-34 to A-47, and assumed, and later in the opinion found, that the government's representation of the Tribe in *Orr Ditch* was improper and inadequate. A-46 to A-47, A-48 to A-49, A-52. But the Tribe's constitutional right to procedural due process was held to have been satisfied based on the trial court's finding that the *Orr Ditch* defendants did not have actual knowledge of the government's failure to represent the Tribe adequately. A-45 to A-47, A-68. The end result of this analysis was that the Tribe was foreclosed from litigating its claimed fishery water right against the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators. A-47 to A-50.

But the court rejected the res judicata defense of TCID and the water users on the Newlands Project. The interests of both the Project and the Pyramid Lake Reservation were represented by the same government attorneys, so there was no adversity between the Tribe and TCID. Since the fishery water right was not actually litigated in *Orr Ditch*, res judicata could not bar the Tribe's claim against co-nonparties who were repre-

---

[5] The petitions for certiorari filed by Nevada and TCID do not take issue with these aspects of the court of appeals' decision.

sented simultaneously by the same government attorneys. A-50 to A-55.

The case was remanded for determinations of whether the Tribe is entitled to a water right for its fishery and, if so, how much water is needed to satisfy that right. Any water subject to the *Orr Ditch* decree that is awarded to the Tribe for fishery purposes would have to come out of the government's entitlement. A-59, A-68.

Nevada and TCID have asked this Court to review the portion of the Ninth Circuit's judgment holding that the Tribe's claims against TCID and Newlands Project water users are not barred by res judicata.

REASONS FOR GRANTING THE CROSS-PETITION

I. The Arguments Raised by the Cross-Petition Are Encompassed within the Petitions But Would, if Adopted, Enlarge the Relief Granted by the Court of Appeals.

The issue in this case is whether the *Orr Ditch* decree precludes the Pyramid Lake Tribe from litigating its claimed fishery water right against any or all of the defendants in this case. The court of appeals upheld the res judicata defense of all of the defendants except TCID and the water users on the Newlands Reclamation Project. In route to that conclusion, that court rejected several contentions of the Pyramid Lake Tribe which, if accepted, would have resulted in the Tribe prevailing against all of the defendants. These contentions are the primary subject of this Cross-Petition.

As respondent, the Pyramid Lake Tribe "may make any argument presented below that supports the judgment of the lower court." *Hankerson v. North Carolina*, 432 U.S. 233, 240 n. 6 (1977). *See also, Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 634 n. 8 (1980); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977). But insofar as the

Tribe's arguments, if successful, would enlarge the relief granted by the court of appeals' judgment, the Tribe must cross-petition as a condition precedent to obtaining such relief. *Andrus v. Idaho*, 445 U.S. 715, 725 n. 6 (1980).

With one limited exception (see *infra* at 18-19), the Tribe's Cross-Petition does not interject issues into this case that otherwise would be absent; they would be raised by the Tribe as respondent if either TCID's or Nevada's Petition is granted. The Cross-Petition is necessary, however, in order to insure that the Tribe obtains the full benefit of prevailing on issues that were considered and rejected by the court of appeals if this Court affirms the judgment against TCID on grounds that would also apply to the other defendants. This Cross-Petition also serves the additional function of informing the Court of the issues that the Tribe would wish to raise in the event certiorari is granted. *See*, 16 Wright, Miller, Cooper & Gressman *Federal Practice and Procedure: Jurisdiction* § 4004 at 523 (1977).

II. The Lower Court's Due Process Analysis Conflicts with Numerous Decisions of This Court.

Res judicata is an equitable, judicially created, doctrine aimed "at the achievement of substantial justice." It embodies the principle, guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution, that a litigant is entitled to "one full and fair opportunity for judicial resolution" of an issue or a claim. *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 325, 328, 329, 334 (1971). *See also, Standefer v. United States*, 447 U.S. 10, 22, 24 (1980); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Menendez v. Saks and Company*, 485 F.2d 1355, 1364 (2d Cir. 1973) ("The doctrine of res judicata is subject to the overriding public policy that 'a party must not be deprived of an actual opportunity to be heard.'")

The Court has consistently denied res judicata effect to proceedings found lacking in procedural due process. *World-Wide Volkewagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946); *Hansberry v. Lee*, 311 U.S. 32, 40, 41, 45 (1940). As stated in the leading case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

See also, Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918) (citations omitted):

> The opportunity to be heard is an essential requisite of due process of law in judicial proceedings . . . [A] state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard . . . .

The court of appeals appears to have recognized these principles. A-34 to A-35. But instead of resolving this issue on the basis of whether the Tribe had an "opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Barry v. Barchi*, 443 U.S. 55, 66 (1979), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), the lower court inexplicably shifted its focus to whether the *Orr Ditch* defendants had actual knowledge of the government's improprieties. A-45 to A-47, A-68.[6]

---

[6] There is no basis for the district court's finding, A-107, that the *Orr Ditch* defendants lacked knowledge of the government's conflict of inteerst. There was no testimony in this case from

This constitutes clear and reversible error because the procedural due process rights of the Tribe do not depend upon what its potential adversaries knew or did not know. The only relevant inquiries are whether the Tribe received notice that its fishery water right was at issue in *Orr Ditch* and whether the Tribe was denied a full and fair opportunity to be heard as a result of the government's conduct. The record is clear that no notice was provided. 24 Tr. 4483; 25 Tr. 4704-05, 4710-11, Tribe App. 1a-2a (defendants' witness). The law is equally clear that representation by a "faithless fiduciary" burdened by a conflict of interest which precludes fulfillment of its duty of undivided loyalty to its beneficiary, *see*, A-49, A-52, does not provide either a "meaningful" or a "full and fair" opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940). *See also, Wood v. Georgia*, 450 U.S. 261 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978); *New Jersey v. New York*, 345 U.S. 369, 373-74 (1953); *Von Moltke v. Gillies*, 332 U.S. 708, 825-26 (1948) (plurality

---

Orr Ditch defendants or their attorneys or anyone else concerning what anyone knew about the quality of the government's representation of the Tribe's interests between 1913 and 1944. On the other hand, the district court found that practically everyone knew about the decline of the Pyramid Lake and Truckee River fisheries. A-101, A-102. As a matter of law the defendants are chargeable with knowledge of the public laws defining the government's obligations to Indian tribes and reclamation projects. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); *infra* at 14 n.8. The burden of proof for all of the elements of res judicata rests on the defendants not only because it is an affirmative defense, Fed. R. Civ. P. 8(3), but also because of 25 U.S.C. § 194. *See*, Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664-69 (1979). In these circumstances, the district court's finding concerning the *Orr Ditch* defendants' lack of knowledge was clearly erroneous and should not have been followed by the court of appeals.

There is reason to believe that the district court's finding may have been the product of improperly placing the burden of proof on the Tribe. A-107 (Findings 32 and 33).

opinion); *Glasser v. United States*, 315 U.S. 60, 70, 75-76 (1942); *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 93, 98-99 (S.D. N.Y. 1972).

The court of appeals' reliance on Section 86(e) of the Restatement (Second) of Judgments (Tent. Draft No. 2, 1975), *see*, A-37, A-45 to A-47, is misplaced. That provision does not purport to define or implement the procedural due process guarantees of the Fifth or Fourteenth Amendments. Rather, it governs relationships between private representatives and their beneficiaries that are not restrained or limited by due process considerations. *See Lugar v. Edmundson Oil Co.*, —— U.S. —— (No. 80-1730, June 25, 1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978). Where, as here, a nonparty is denied a meaningful, or a full and fair, opportunity to be heard as a result of state or federal action, the opposing parties' knowledge or lack of knowledge is entirely irrelevant.[7]

This analysis is supported by the Restatement (Second) of Judgments, *supra*. Section 86(d) of the Restatement (Second), quoted at A-37, applies to class actions and provides that members of a class are not bound if there was a substantial divergence of interest between the representatives and the members that pre-

[7] Since only government officials are bound by due process constraints, it is their actual or imputed knowledge, not that of the *Orr Ditch* defendants, which could have any conceivable bearing on the issue of whether the Tribe was denied a full and fair opportunity to be heard. The district court found that federal officials were aware of the potential tribal claim of a water right for fishery purposes and they knew that such a claim would conflict with the government's claim to Truckee River water for the Newlands Project. A-72 to A-79, A-100, A-102, A-105 to A-106, A-107. The record also shows that the federal district judge presiding over the *Orr Ditch* litigation was apprised of the government's conflict in seeking Truckee River water for both the Pyramid Lake Reservation and the Newlands Project. Tribe App. 4a-5a. Such knowledge also triggers due process concerns. *See* Wood v. Georgia, 450 U.S. 261 (1981).

vented fair representation of the members' interest. There is no mention in the Restatement (Second) of whether this divergence of interest was known to other parties in the litigation. Immediately following the portion of Comment f to Section 86 quoted by the court of appeals, A-46, the Restatement (Second) goes on to state that adequacy of representation of nonparties in actions by or against public agencies or officials should be determined by the same standard that is applicable to class actions. Comment f to the Restatement (Second), *supra*, at 77.[8] Judged by that standard, the *Orr Ditch* decree

---

[8] Class actions and government representation of nonparties' interests are alike in several relevant respects. Class actions are "an invention of equity," Hansberry v. Lee, *supra*, 311 U.S. at 41, in which "[i]n a very real sense, [the judge] is the guardian of the interests of the absentees." 3B *Moore's Federal Practice* ¶ 23.70 (2d ed.) Consequently, both class actions and representation of non-parties' interests by government attorneys implicate the due process constraints of the Fifth and Fourteenth Amendments against state and federal action. Second, class representatives are subject to open and public scrutiny by the court and the parties to insure that they "will fairly and adequately protect the interests of the class." Rule 23(a), Fed. R. Civ. P. Similarly, the multiple and at times conflicting interests served by government attorneys are matters of public record, knowledge of which is chargeable to opposing litigants. Schweiker v. Hansen, 450 U.S. 785 (1981), *reaffirming* Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947). In this case, for example, the government's actual representation of the interests of both the Pyramid Lake Reservation and the Newlands Reclamation Project was apparent on the face of the *Orr Ditch* Amended Complaint, Nev. App. 2a-11a, and the government's conflicting legal responsibilities to the Tribe and to the Newlands Project water users are based on public laws and are manifested in judicial decisions. *See* 25 U.S.C. § 175; Heckman v. United States, 224 U.S. 413 (1912); Winters v. United States, 207 U.S. 564 (1908); 43 U.S.C. §§ 372, 419, 461, 498; Ickes v. Fox, 300 U.S. 82, 94-95 (1937). By contrast, in the case of banks, insurance companies and other private fiduciaries, it would be virtually impossible for an opposing party to ascertain the full range of the representative's own interests and those of all of its beneficiaries that could conceivably conflict with its responsibility

cannot deprive the Pyramid Lake Tribe of its constitutional entitlement to one full and fair day in court. *Hansberry v. Lee*, 311 U.S. 32 (1940).

This Court should review and reverse the court of appeals' departure from the long and consistent lines of Supreme Court decisions holding that due process is denied when state or federal action results in the representation of conflicting interests by the same attorneys and that proceedings found lacking in due process cannot be given res judicata effect.

III. The Tribe's Fishery Water Right Was Not Part of the Government's *Orr Ditch* Cause of Action.

During the course of the *Orr Ditch* litigation, the Justice Department attorneys responsible for the case unequivocally stated their belief that the claim of a water right for fishery purposes was entirely outside of its scope. A-12 to A-13; partially quoted *supra*, at 5. The basis for this belief was that nothing was said about fish or about the need for water for fish purposes in the complaint or any in any other pleading or in any of the testimony. *Id.* There are also indications that the government attorneys viewed disputes involving conflicts between the interests of the Newlands Project and the Pyramid Lake Indian Reservation as administrative matters, not questions for litigation. A-54 n. 21.

The lower court acknowledged that quantifying the Tribe's water right for fishery purposes and its right to water for agricultural purposes requires proof of different facts. A-32. Under the "same evidence" test for determining identity of claims set forth in *United States v. The Haytian Republic*, 154 U.S. 118, 125 (1891), and

---

to a particular beneficiary in a specific suit. Therefore, in the private setting, the requirement of actual notice of inadequate representation is a practical necessity. Since no governmental action is involved, the due process clauses are not applicable.

Section 61 of the Restatement of Judgments (1942), the water right for fishery purposes would be considered a separate cause of action from the agricultural water right asserted for the Pyramid Lake Reservation by the government in *Orr Ditch*. A-32. But the court of appeals held that the " 'same evidence' test is but one of many tests used to distinguish one cause of action from another," citing more recent authorities, 1B *Moore's Federal Practice* ¶ 0.410[1], at 1157-58 (2d ed. 1980); and the Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973). A-32. Applying the more modern criteria, the fishery water right was held to be part of the government's *Orr Ditch* cause of action. A-33.[9]

It is true that the trend of the case law in recent years has been toward "expansion of the definition of claim in bar and merger contexts." *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 327 (1971).. But it is fundamentally unfair to apply these new standards retroactively so as to deprive the Tribe of its most valuable property by barring a claim that might have been asserted in litigation commenced in 1913, tried from 1919 to 1921, and finally completed in 1944. *Cf. Greene v. United States*, 376 U.S. 149, 160 (1964); *Union Pacific Co. v. Laramie Stock*

---

[9] Even if the more "pragmatic" test of Section 61 of the Restatement (Second) of Judgments (Tent. Draft No. 1, 1973) is applied, the fishery water right should be held to be a separate cause of action because: (i) it requires proof of different facts; (ii) it should not and could not have been asserted by government attorneys who were also representing the conflicting interests of the Newlands Reclamation Project, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); and (iii) it would not have presented a justiciable issue even if it had been asserted. *See* United States v. Johnson, 319 U.S. 302 (1943); Restatement (Second) of Judgments § 61.2(1)(c), (d) (Tent. Draft No. 1, 1973). *Compare*, United States v. Nixon, 418 U.S. 683, 693-97 (1974); United States v. Interstate Commerce Commission, 337 U.S. 426, 430-32 (1949).

Yards Co., 231 U.S. 190, 199 (1913) ("The rule [to consider legislation as addressed to the future, not to the past] is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.")[10] Accordingly, the determination of whether the fishery water right should have been claimed in *Orr Ditch* should be made by reference to the standards applicable at the time that litigation was pending. Based on those standards, the Justice Department attorneys correctly concluded that the fishery water right was not part of the government's *Orr Ditch* cause of action.[11]

The fundamental unfairness of the lower court's retroactive application of a new standard to deprive the Tribe of its most cherished and valuable asset merits this Court's review and reversal.

---

[10] The retroactive application of new laws raises significant due process concerns in its own rights. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976).

[11] This conclusion is also supported by the fact that *Orr Ditch* was a quiet title, *in personam* action, not the more modern type of statutory *in rem* proceeding known as a general stream adjudication. *See generally*, 6 *Waters and Water Rights* Chapts. 28, 29 R. Clark ed. 1972. In quiet title actions, the subject matter and reach of the judgment are confined to what the plaintiff places at issue and the adverse claims raised by the defendants. 2 *Freeman on Judgments* § 874 (5th Cir. 1925); 6 *Waters and Water Rights* § 513.2 (R. Clark ed. 1972). In this case, the only property placed at issue by the United States were the irrigation rights of the Newlands Project and the Pyramid Lake Reservation. The fact that the government, the other *Orr Ditch* parties, and the *Orr Ditch* court intended to make the adjudication as comprehensive as possible, see A-33, cannot alter the essential nature of the action or extend the court's jurisdiction. *See* World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980).

IV. The Res Judicata Defense Is Not Available to Non-*Orr Ditch* Parties.

The court of appeals obviously erred in upholding the res judicata defense of subsequent (*i.e.*, post-1944) appropriators of Truckee River water who are neither *Orr Ditch* parties nor successors in interest to *Orr Ditch* parties. A-49. *Orr Ditch* was not an *in rem* action, A-49, and the subsequent appropriators were not *Orr Ditch* parties. Therefore, the *Orr Ditch* cause of action and the cause of action asserted in this case against the subsequent appropriators are different "by definition." *Montana v. United States*, 440 U.S. 147, 154 (1979). When different causes of action are involved, the preclusion defense automatically "fall[s] under the rubric of collateral estoppel rather than res judicata." *Montana v. United States*, 440 U.S. 147, 154 (1979).

Unlike res judicata, preclusion by operation of collateral estoppel requires the actual litigation and determination of the precise issue in the prior litigation; it is not sufficient that an issue could or should have been litigated. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979); *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877); A-34 n. 11. Since both lower courts expressly found that the fishery water right was not actually litigated in *Orr Ditch*, A-55, A-104, A-108, the Tribe cannot be barred from asserting its claimed water right for fishery purposes against non-*Orr Ditch* parties.

The court of appeals' decision allowing nonparties to take advantage of res judicata merits review because it is inconsistent with this Court's holdings that the preclusion defense available to nonparties is collateral estoppel, not res judicata.

CONCLUSION

The Pyramid Lake Tribe's Cross-Petition for a Writ of Certiorari should be granted if the Court agrees to hear Nevada's Petition, No. 81-2245, or TCID's Petition, No. 81-2276.

Respectfully submitted,

ROBERT S. FELCYGER
FREDERICKS & PELCYGER
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683

MICHAEL R. THORP
EISENHOWER, CARLSON, NEWLANDS, REHA, HENRIOT & QUINN
1200 First Interstate Plaza
Tacoma, Washington 98402
(206) 572-4500

SCOTT B. MCELROY
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for Cross-Petitioner Pyramid Lake Paiute Tribe of Indians

July 1982

APPENDIX

24 Tr. 4483:

Q. BY MR. SWAFFORD: Professor Hulse, will you then please explain your reasons for coming to that conclusion.

A. In looking through the files and records of the Pyramid Lake Paiute Tribe which were deposited at the University of Nevada about ten years ago, I looked strenuously and expectively for a file on the Orr Ditch case and I didn't find one.

I thought that there would be some expression of interest or approval or disapproval or disappointment, but it does not appear in any of the minutes that I was able to see, nor in any of their correspondence.

• • • •

25 Tr. 4704-05:

Q. BY MR. PELCYGER: Now, in your research, Professor Hulse, did you come across any evidence that any representatives of the government ever discussed the Orr Water Ditch case with the Pyramid Lake Indians?

A. I have found no evidence one way or another on that.

Q. What do you mean you found no evidence one way or the other? Did you find any evidence that that had occurred?

A. No, I did not.

Q. Did you find evidence, for example, that representatives of the Bureau of Indian Affairs and the United States Government, for example, constantly throughout the period of the Orr Ditch case were discussing with the Pyramid Lake Indians the developments in the Squatters controversy?

A. There was frequent communication with them on the Squatter controversy.

Q. Did you encounter any evidence whatsoever, Professor Hulse, to indicate that the Pyramid Lake Indians

or the Pyramid Lake Tribe were ever invited to participate or suggested that they participate in the Orr Water Ditch case by either government officials or anybody else?

A. No, I did not.

Q. Is there any evidence that you encountered, Professor Hulse, that the Pyramid Lake Tribe was consulted before the final decree was approved in 1944?

A. No, I found no evidence on that.

25 Tr. 4710-11:

A. What I'm saying is that the legal entity, the Pyramid Lake Paiute Tribe, did not exist, so far as I know, prior to 1934.

Q. Okay. But they did act and they did meet from time to time and they passed resolutions; they passed petitions, and they made their views known?

A. From time to time, that is true, yes, the Pyramid Lake Paiutes did. Whether you call them a Tribe, that's the question I'm having trouble with, you see.

Q. Now, during that entire period of historical record that you examined, did you ever come across any indication that the Tribe, acting at a meeting such as this or in any other reasonably formal way, ever acquiesced in or waived or agreed to the diminishment of any water rights that they might possess for fishery purposes?

A. I understand your question. I know of no formal action by the Pyramid Lake Indians of that kind.

Q. Isn't it true, Professor Hulse, that in the last series of questions that I have asked you regarding your historical research, before the break and just now, that was exactly the sort of information that you would be looking for in your historical investigations? If you came across that kind of information, that would have been highly significant, wouldn't it?

A. That would have been, yes.

• • • •

42 Tr. 8553-54:

Q. Dr. Stewart, in your review of the documents which you have reviewed, have you found any evidence that the Pyramid Lake Indians either participated in asked to participate in the Orr Water Ditch case?

A. I found no evidence that they participated in hearings in the Orr Water Ditch case.

Q. Or that they were asked to?

A. No evidence that they were asked to.

Q. When you heard Professor Hulse's testimony, was it your understanding that his finding was to the same effect?

A. That's my understanding.

• • • •

43 Tr. 8792:

Q. BY MR. GIRARD: You indicated that you could find no documents that you were aware of that referred to the Orr Ditch case, of the Indians' knowledge of the Orr Ditch case?

A. That they were specifically instructed or informed or invited to participate or otherwise directly involved, asked to be involved, or told about what was going on, I found no such document.

EXHIBIT A-408

Carson Indian School,
Stewart, Nevada,
March 22, 1926.

Judge E. S. Farrington,
U.S. Court,
Carson City, Nevada.

Dear Judge Farrington:—

I am writing you to find out if some arrangement can be made to allow the entire flow of Truckee River to run into Pyramid for a period of about two weeks.

My reason for requesting this is that there is so little water in the Truckee River below the Derby Dam that trout and other fish in Pyramid Lake cannot get up the river to spawn. The Indians depend to a great extent upon the fish in Pyramid Lake for a livelihood and to them the question of water in the river is a very serious matter.

In past years I believe the United States Reclamation Service arranged to have the entire flow of the River run into Pyramid Lake for a short period in the Spring—the spawning season for fish—but Mr. Richardson, Superintendent of the Newlands Projects, informs me that the turning of the water into Pyramid Lake is now a matter to be handled by the United States Court.

Toward the latter end of last week there was more water running down the river and reaching Pyramid Lake than at any time during the winter. This was due to the warm weather which melted the snows in the mountains and there was more water at the Derby Dam than the canal conveying the water to the Lahonton Reservoir could carry, and consequently some was allowed to pass the Dam and run into Pyramid Lake. There was enough water running into the lake to allow

the trout to get into the river and some were going up the fish ladder at the Indian Dam a few miles from the mouth of the river.

The Indians have been asking all winter to have the waters of the Truckee River allowed to flow into the lake for a period of two weeks at this time of the year, and I trust the justice of their request is sufficiently apparent to allow favorable action.

The trout in the lake must go up the river to spawn at this time of the year, and unless there is sufficient water running into the lake the fish cannot enter the river on account of the bars at its mouth.

I shall appreciate whatever you may be able to do in arranging that the Truckee River may be allowed to flow into the Lake for a two week's period now, as the trout are beginning to spawn. A little later other fish go up the river also to spawn.

Very respectfully,

Superintendent.

Office - Supreme Court, U.S.
FILED
AUG 24 1982
STEVAS.

No. 82-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

STATE OF NEVADA'S BRIEF IN OPPOSITION

RICHARD H. BRYAN
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89710
(702) 885-4170

E. BARRETT PRETTYMAN, JR. *
Special Deputy Attorney General
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

LARRY D. STRUVE
Chief Deputy Attorney General
Supreme Court Building
Carson City, Nevada 89710
(702) 885-4170

JOHN W. HOFFMAN
HAROLD A. SWAFFORD
Special Deputies Attorney General
290 South Arlington Avenue
P. O. Box 187
Reno, Nevada 89504
(702) 322-4081

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

We submit that the QUESTION PRESENTED by the Pyramid Lake Paiute Tribe of Indians is not posed by the record in this case. The only QUESTION PRESENTED insofar as the Tribe is concerned is whether the Ninth Circuit Court of Appeals correctly affirmed the findings of the District Court that (a) the United States properly represented the Tribe's interests, and (b) the Tribe has never questioned the good faith or motives of the United States in these proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
1. The Petition is a Conditional One	1
2. Due Process is Not An Issue	1
3. The Tribe's Position is Fatally Inconsistent	5
4. Another Contemporaneous Related Case Supports the Fact Finding Now Challenged	6
5. The Decision As To The *Orr Ditch* Defendants Below Does Not Conflict With Any Decision of This Court	8
6. The Tribe's Other Contentions	9
CONCLUSION	10
APPENDIX A	
City of Reno Brief before the Ninth Circuit, pp. 11-19	1a

TABLE OF AUTHORITIES

CASES Page

Baltimore S.S. Co. v. *Phillips*, 274 U.S. 316 (1927) 9
Dery v. *Wyer*, 265 F.2d 804 (2nd Cir. 1959) 9
Fowler v. *Wolff*, 479 F.2d 338 (8th Cir. 1973) 9
Gambocz v. *Yelencsics*, 468 F.2d 837 (3d Cir. 1972) 9
Hansberry v. *Lee*, 311 U.S. 32 (1940) 8
Heckman v. *United States*, 224 U.S. 413 (1912) 8
Rhodes v. *Jones*, 351 F.2d (8th Cir. 1965) 9
Schuykill Fuel Corp. v. *B & C Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456 (1929) 9
United States v. *Orr Water Ditch Co.*, Equity No. A-3 ..... *passim*
United States v. *Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935) 6, 7
Winters v. *United States*, 104 F.2d 335 (1939) 6, 7

MISCELLANEOUS

Stern & Gressman, *Supreme Court Practice*, 5th ed., pp. 456-461 2
Supreme Court Rule 21.1(a) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-38

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

STATE OF NEVADA'S BRIEF IN OPPOSITION

---

1. The Petition is a Conditional One.

At the outset, it should be emphasized that the Cross-Petition of the Pyramid Lake Paiute Tribe of Indians (the "Tribe") is a conditional one (Cross-Pet. p. 19). The Tribe seeks certiorari only in the event that the Court grants the Petition of the State of Nevada (No. 81-2245) and/or that of the Truckee-Carson Irrigation District ("T.C.I.D.") (No. 81-2276).

2. Due Process is Not An Issue.

Although the body of the Tribe's Cross-Petition is peppered with references to an alleged denial of due process of law, the Question Presented makes no reference to due process, to the United States Constitution, or to any Article or Amendment thereof. Petitioner is therefor precluded from arguing a constitutional principle.

Rule 21.1(a) of the Rules of this Court.[1] The record presents none of the exceptions to this Rule noted in Stern & Gressman, *Supreme Court Practice* (5th ed.), pp. 456-461, and the cases there cited. Nevertheless, because the Court may choose to address due process, we show below why the record in this case does not properly present such an issue.

First, it is important to understand precisely what the Ninth Circuit held. It noted that the Tribe was entitled to due process (Nevada App. p. 232a). Contrary to the Cross-Petition, however, the court specifically declined to find the Government's representation improper or inadequate (Nevada App. pp. 237a-238a). That could have ended the matter, since the Tribe's fundamental rights were not denied. Nevertheless, out of an abundance of caution, the court proceeded to an alternative holding. It assumed for purposes of argument, but did not decide, that the United States had been a faithless fiduciary. The court then proceeded to address the question of the knowledge of the *Orr Ditch* defendants as to the claimed impropriety. It found that they had no such knowledge, and the court therefore followed the general rule, except as to T.C.I.D., that representation by the United States will bind an Indian tribe and its individual members (Nevada App. p. 236a).

In this regard, it must be remembered that neither the Government nor the Tribe had ever challenged the District Court's Finding of Fact that even if there was some impropriety in the Government's representation (which the District Court specifically found not to exist), it was unknown to the *defendants* in the *Orr Ditch* case (Nevada App. p. 238a). The Ninth Circuit, after re-

[1] The Tribe presented essentially the same issues to the Ninth Circuit as it has to this Court. In the ISSUES PRESENTED FOR REVIEW to the Circuit Court, as here, no mention was made of a constitutional question. See Brief of Appellant Pyramid Lake Paiute Tribe of Indians, Ninth Circuit, p. 1.

viewing the record relating to that Finding on its own initiative, did not find it clearly erroneous (Nevada App. p. 238a).

Thus, though the Ninth Circuit, for analysis purposes only, approached the case in the alternative as if the United States might have been guilty of fraud or collusion, the court never overturned the trial court finding that the good faith or motives of the government counsel were not questioned by the United States or the Tribe in this proceeding.[2] Therefore, the record below does not support any claim that the United States was a faithless fiduciary or chargeable with fraud or collusion. Quite the contrary is true.

The Tribe nevertheless appears to contend that *it* was without knowledge of the *Orr Ditch* proceeding and of the fact that its water rights were to be determined therein. The first response is that this argument addresses only the Ninth Circuit's *alternative* holding, as outlined above. The second, and even more important response, is that the record wholly refutes the Tribe's factual premise:

(a) Exhibit A16, admitted into evidence, contains answers by the Tribe in response to requests for admissions propounded by the State of Nevada. The Tribe admitted

---

[2] The trial court's Finding of Fact Number 29 reads as follows:

> The government lawyers in *Orr Ditch*, both departmental, agency and bureaus, as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of purpose or interest in carrying out the decisions and directions of their superiors in the executive department of government and the Tribe has not suffered any deprivation or denial of due process case to diminish or defeat the rights of the defendants acquired by the adjudication and the final decree in *Orr Ditch*. *The good faith or motives of said government counsel is not questioned by plaintiff and the Tribe in this proceeding.* [Nevada App. pp. 189a-190a; emphasis added.]

in Responses 19-20, 31, 34, 37 and 40 that during the course of the *Orr Ditch* proceedings, one or more of the Indians belonging on the Pyramid Lake Reservation were aware of the existence of the *Orr Ditch* case and were also aware that the interests of the Tribe were involved.

(b) In a Finding of Fact not disturbed by the Court of Appeals, the District Court determined that the Tribe had the actual and legal ability and capacity to intervene in *Orr Ditch* from the time of the filing of the complaint up to and including the entry of the Final Decree for the purpose of asserting an alleged fishery water right (Nevada App. p. 186a). The Tribe did successfully intervene in *Orr Ditch* on August 5, 1976 (Nevada App. p. 186a). The actual ability to intervene for purposes of asserting the right now claimed implies a knowledge of the case and the means to appear in its own right. Both implications are supported by the record. Also, the trial court finding that the Indians were aware of the decline of the fishery during the course of the litigation has never been challenged (Nevada App. p. 187a).

(c) Correspondence and tribal minutes admitted into evidence also show that the Indians were aware of the *Orr Ditch* case and that the Government was representing the Reservation interests. For example, Exhibit A464 contains correspondence between John Collier of Indian Affairs and Teddy James, Secretary of the Pyramid Lake Indian Council, discussing in part the *Orr Ditch* case and the fact that the Attorney General had been recently advised as to the particular interest of Mr. James in the per-acre duty of water for the Tribe fixed in the 1926 Temporary Restraining Order. Exhibit U259 includes minutes of a tribal meeting held February 8, 1934. During the discussion, the Chief wanted to know why the Government was not obtaining more water for irrigation for the Indians of the Reservation. Exhibit A10115d is made up of correspondence from the Superintendent of the Reservation to the Commissioner of Indian Affairs,

attaching minutes of a Pyramid Lake Indian delegation, which was seeking more responsive representation by the Government. For additional examples, see pages 11-14 of the City of Reno's Brief before the Ninth Circuit, printed as Appendix A hereto.

(d) During the course of the *Orr Ditch* litigation, the Tribe contracted with its own independent counsel to deal with an unrelated issue (Ex. U259, Transcript Vol. 43, pp. 8727-29).

(e) In 1943, the Tribal Chairman, the Secretary of the Tribe, and Commissioner of Indian Affairs Collier appeared before the House Committee on Indian Affairs. They had with them the *Orr Ditch* Temporary Restraining Order (see Nevada App. pp. 122-162), and they discussed the water rights decreed by the court for the Reservation (Exhibits U-543 and A-605).

In short, the Tribe had actual knowledge of the *Orr Ditch* case, as well as knowledge that the Lake and the fishery were declining, knowledge of the claim that the Tribe was entitled to the earliest right on the river, and knowledge that the United States was representing its interests in water rights. Even though the Tribe had the actual and legal ability to intervene during the course of the *Orr Ditch* proceedings, it did not choose to do so until the trial of this case was at an active stage.

Thus, for each of the reasons cited above, the Tribe has totally failed to undermine the Ninth Circuit's ruling below.

3. The Tribe's Position is Fatally Inconsistent.

The Tribe takes inconsistent positions in regard to what it knew or was responsible for knowing at the time of the *Orr Ditch* litigation. On the one hand, it claims that it did not participate in, and was not consulted about, the litigation (Cross-Pet. pp. 4-5). The implication seems to be—although the Tribe avoids saying

it directly—that the Tribe was so unaware of the litigation that it was not able to protect its rights. On the other hand, the Tribe argues that "the government's actual representation of the interests of both the Pyramid Lake Reservation and the Newlands Reclamation Project was apparent on the face of the *Orr Ditch* Amended Complaint" (*id.* at p. 14 n. 8), that "the government's conflicting legal responsibilities to the Tribe and to the Newlands Project water users are based on public laws and are manifested in judicial decisions" (*id.*), and that the *defendants* in *Orr Ditch* were "chargeable with knowledge of the public laws defining the government's obligation to the Indian tribes and reclamation projects" (*id.* at p. 12 n. 6). It is difficult to understand how the defendant water users can be charged with public knowledge of all aspects of the *Orr Ditch* litigation, both from the complaint and from laws and judicial decisions, and yet the Tribe is to be treated as somehow not responsible for knowing the same public facts.

4. Another Contemporaneous Related Case Supports the Fact Finding Now Challenged.

There is substantial evidence to support the lower court's determination that any impropriety in the Government's representation was unknown to the defendants in *Orr Ditch*. The Tribe argues that the failure of the United States to assert a fishery claim for the Reservation was due to a conflict of interest within the United States. However, the evidence showed that it was unlikely that the United States would have asserted a fishery water right even if it had not also been representing the Reclamation Project interest. The contemporaneous *Walker River* case, *United States* v. *Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935), involved a claim for *Winters* rights on the Walker Lake Indian Reservation, based upon the same series of letters and orders in 1859 and the Executive Order of President

Grant issued in 1874 as are involved in the instant case.[3] In *Walker River*, there could have been no conflict of interest because the United States represented only the interest of the Indian Reservation; no reclamation project or other interest was asserted. Nevertheless, the Government did not assert a fishery water right in that case, even though, had the Government believed such a claim had merit, there was no alleged conflict of interest to prevent the assertion of such a claim. Thus, the *Orr Ditch* defendants had further reason for not questioning the appropriateness of the Government representation in the *Orr Ditch* case.

The trial court was presented with no evidence in the record below of any *Orr Ditch* defendant recognizing the possibility of a *Winters* right for fishery purposes. It should not lightly be assumed that a desert lake that had been shrinking since prehistoric times would receive a federal water right for fishery and lake maintenance purposes, particularly when the thrust of national policy at the time was to reclaim the otherwise useless arid lands to the West and to develop Indian agricultural pursuits.

Despite the *Walker River* ruling that there was no *Winters* right for an Executive Order reservation, the United States in the *Orr Ditch* case nonetheless pressed for and achieved through the Truckee River Agreement a greater *Winters* water right for the Tribe than had been established in the 1926 Temporary Restraining Order. The Truckee River Agreement was executed after the *Walker River* District Court decision but before its reversal. The *Orr Ditch* defendants could only have concluded that the Tribe was receiving able representation by the United States and that the Tribe had obtained,

---

[3] The holding that there was no *Winters* right for an Executive Order reservation was reversed by the Ninth Circuit Court of Appeals. 104 F.2d 335 (1939).

through such representation, a full and fair opportunity to be heard.

5. The Decision As To The Orr Ditch Defendants Below Does Not Conflict With Any Decision of This Court.

The State of Nevada does not contend that any of the due process cases cited by Cross-Petitioner were wrongly decided. However, none of these cases addresses the special relationship that exists between the United States and Indian tribes. Though *Hansberry* v. *Lee*, 311 U.S. 32 (1940), does address representative litigation, and is a leading class action decision, it does not displace *Heckman* v. *United States*, 224 U.S. 413 (1912), as the leading case dealing with the representation of Indian tribes by the United States. Even in *Hansberry*, however, the Court recognized (p. 43) that non-parties were to be bound where, because of the nature of the relationship between the party and non-party, the party is legally entitled to stand in judgment for the latter. Thus, under either *Heckman* or *Hansberry*, the actions of the United States in the *Orr Ditch* litigation require the res judicata effect which has been given the *Orr Ditch* Final Decree.

The logical extension of the Tribe's *Hansberry* interpretation would lead to an untenable result. If the Tribe has been denied due process, and the *Orr Ditch* Decree is wholly ineffective as to the Tribe's interests, then the Tribe becomes an indispensable party in any like litigation commenced by the United States (see F.R.C.P. 12b (7) and 19(b)). Because of tribal sovereign immunity, the United States would be unable to litigate federal property rights and those of Indian tribes without the consent, approval and intervention of the Indian tribe. The constitutional plenary power over the Indian tribes would therefore be meaningless in such a case. Though the courts have been appropriately lenient in allowing the intervention of Indian tribes, those cases deal with prospective representation. However, the case at bar is retrospective and the then apparent authority of the United States should not be nullified.

6. The Tribe's Other Contentions.

None of the Tribe's other contentions in its Cross-Petition has merit or warrants review by this Court.[4]

For example, the court below discussed in detail the Tribe's "different cause of action" argument, based on the "same evidence" test, and for good reasons rejected it (Nevada App. pp. 224a-226a). The various tests for determining whether there is a same cause of action for res judicata purposes were thoroughly briefed by all concerned. In addition to the "same evidence test", the "impairment of right" test set forth by then Judge Cardozo supports a finding of the same cause of action. *Schuykill Fuel Corp.* v. *B & C Nieberg Realty Corp.*, 250 N.Y. 304, 165 NE 456 (1929). The "operative facts" test supports the same finding. *Dery* v. *Wyer*, 265 F.2d 804 (2d Cir. 1959); *Rhodes* v. *Jones*, 351 F.2d (8th Cir. 1965). Also, the "primary right and duty" test produces the same result. *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927).

The Tribe's argument boils down to a claim that only one of the many tests for the same cause of action should have been applied, and that both courts below misapplied

---

[4] There is no validity, for example, to the Tribe's argument (Cross-Pet. p. 18) that post-1944 appropriators of Truckee River water should not be bound by the *Orr Ditch* decree. The District Court found as a fact that all defendants herein are "successors in interest of or were then and are now in privity with the defendants in the *Orr Ditch* proceedings" (Nevada App. p. 188a). The Court of Appeals held that the United States framed its complaint in the broadest possible way so as to include all Truckee River waters, and subsequent appropriators reasonably relied upon the finality of the *Orr Ditch* Decree (Nevada App. pp. 239a-240a). The lower courts' findings and conclusions of law in this respect are fully supported by the authorities. *E.g.*, *Fowler* v. *Wolff*, 479 F.2d 338 (8th Cir. 1973); *Gambocz* v. *Yelencsics*, 468 F.2d 837 (3d Cir. 1972).

the "same evidence" test. No review by this Court is merited on this point.[5]

CONCLUSION

Thus, we have here a situation in which the United States represented a number of interests, including those of the Tribe, during the *Orr Ditch* proceeding. United States officials were fully aware of the Tribe's asserted need for water rights for fishery purposes.[6] And the Tribe, in turn, was fully aware of the *Orr Ditch* litigation. To the extent that the Tribe's needs conflicted with the need for irrigation under the Newlands Project, the United States made a deliberate decision, pursuant to Congressionally-dictated policy, to pursue the Newlands Project. To allow the Tribe and/or the United States to assert now what amounts to a superior right for the Tribe—because the amount of available water will not accommodate the needs of both the Tribe and the decreed rights—would not only thwart the long-established ju-

---

[5] The burden of proof point raised by the Tribe (Cross-Pet. pp. 11-12, n. 6) has no merit. The *Orr Ditch* defendants had the burden of proof to make a prima facie res judicata case, which they did. The United States and the Tribe then contended that even if all of the elements of res judicata were present, that doctrine should not be applied if the Tribe's claim could be superimposed on the river and not harm the other right holders. The trial proceeded for weeks with evidence relating to "no harm". Nevada's Brief before the Ninth Circuit at pages 53-60 discussed the great harm that would result if the Tribe's claim was granted. The reason the burden of proof issue was raised on appeal was that the trial judge did not make a fact finding that harm would result if the Tribe's claims were granted. Instead, the trial court ruled that the plaintiffs had failed in their burden of proof to show no harm (Nevada App. p. 191a). There was no error.

[6] The Tribe concedes as much: "Government officials were aware of the potential claim of a water right to maintain and preserve the Tribe's Pyramid Lake and Truckee River fisheries [at the time of the *Orr Ditch* litigation]" (Cross-Pet. p. 5).

dicial decree [7] but ignore the deliberate decision of the Tribe's representatives at the time of the *Orr Ditch* litigation. Moreover, to declare that the Tribe was denied due process would be to conclude that the United States is incapable of fully representing the Tribe's interests, which has never been the law.

Thus, the Tribe's Petition is wholly without merit. We respectfully suggest that the Petitions filed by the State of Nevada (No. 81-2245) and T.C.I.D. (No. 81-2276) be granted, and that the instant Petition filed by the Tribe be denied.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89710

E. BARRETT PRETTYMAN, JR. *
Special Deputy Attorney General
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

LARRY D. STRUVE
Chief Deputy Attorney General
Supreme Court Building
Carson City, Nevada 89710

JOHN W. HOFFMAN
HAROLD A. SWAFFORD
Special Deputies Attorney General
290 South Arlington Avenue
P. O. Box 187
Reno, Nevada 89504

* Counsel of Record

---

[7] The Tribe admits that, "On res judicata, the court of appeals first affirmed the district court's holding that the fishery water right was encompassed in the government's *Orr Ditch* cause of action" (Cross-Pet. p. 8). The Tribe also admits that, "The government, the other *Orr Ditch* parties, and the *Orr Ditch* court intended to make the adjudication as comprehensive as possible" (*id.* at p. 17 n. 11).

APPENDIX A

City of Reno Brief before the Ninth Circuit, pp. 11-19

* * * Awareness of the *Orr Ditch* litigation on the part of the Tribe is demonstrated by the documents which quote or relate to statements of the Pyramid Indians. Some examples are:

1. About February 12, 1913, "W.T. "Billy" Roberts, "a leading member of the Piute Tribe" (at Pyramid) stated to a newspaper reporter:

   "They want the government to put a concrete dam . . . on the Truckee river near the reservation and widen the ditch so the farmers on the west side of Pyramid Lake can get more water."

   "The government builds the Derby dam and Lahontan Dam and takes all land and gives to the white people but don't give a dam for us . . ." And it was reported:

   "The Indians raised the money to send Billy to Washington to plead their cause." Exh. U-62, p. 2; see: Exh. U-61.

2. On January 20, 1925, Abraham Mauwee, in a statement transmitted to Commissioner of Indian Affairs, said:

   ". . . must have water to save their fish; that is our water and should be turned down to us."

   "We are under the Government and the Government should protect our rights to this water, and not allow the water taken away from us." Exhs. U-169; A-101150; U-170, p. 1.

   Furthermore, on January 20, 1925, this Indian delegation stated:

"We want you (Superintendent Jenkins) to see the U.S. Attorney and see if notice cannot be served to make these people (squatters) to stop interfering with water that by right should go to the reservation." Exh. U-170, p. 2.

3. On February 7, 1930, Dave Gibson, the appointed Tribal representative, wrote to the Commissioner of Indian Affairs stating, amongst other things, that the Indians want a higher dam in the Truckee River on reservation; he said:

"Our greatest need is water for irrigation . . . It is, of course, advisable, to have such water rights as we are entitled to, properly adjusted, as such pertains to the Truckee River, as well." Exh. U-229.

4. About December 5, 1931, "Senator Lynn J. Frazier, Chairman of the Senate Indian Committee," received "a complaint of the Indians at Pyramid Lake" wherein it is stated that the Indians petition:

". . . We feel that from the Truckee River we are entitled to water to irrigate 3500 acres of land . . ." Exhs. A-50172B/U-238.

[The *Orr Ditch* temporary restraining order allocated to the Indians a certain amount of water to irrigate 3130 acres of land pursuant to Claim No. 1. Exh. A-99002, p. 9.]

5. Pyramid Indians on February 8, 1934 were initiating the process to form their self-government and one of the first items discussed by a member of the Tribe during the meeting was ". . . why the Government does not give more water for irrigation to the Indians of this reservation." Exh. A-456; 24 Tr. 4444-4446.

6. In a letter to Commissioner Collier, July 9, 1934:

"The Indians of Pyramid Lake Reservation are hoping that they can get an investigation of their water rights . . ."

"They are supposed to have the first right on the Truckee River since the year 1859, when at that time 58.7 second ft. of water was given them for their use . . ." (Statement of Pyramid Indian Council) Exh. A-458.

7. In a letter to Commissioner Collier, July 26, 1934:

". . . we were allocated first rights to 58.7 cu. ft. per sec. of water . . . water master on the reservation attempting to adjust the matter and is going tomorrow to Reno for another conference wtih the Nevada Water Master. . ." (Statement of Tribal Council) Exh. A-459.

8. Tribal Minutes, July 13, 1936:

". . . regarding the upstream storage on the Truckee River. A letter to made up was approved, this petition to cover our water right and to request that certain amount of water be . . . for Pyramid Lake year around." Exh. U-259.

9. Tribal Minutes, February 8, 1938:

"A suggestion concerning fish propogation was discussed. . . A stream of water sufficient enough year around; . . . The members emphasized their feeling toward the 'Old Water Right.'" Exh. U-259.

10. Tribal Minutes, August 6, 1940:

"The meeting was turned over to the Irrigation Supervising Engineer of San Francisco, California. Mr. Portier asked the Councilmen to consider a proposed project of changing the course of the river flow and to raise the water to its original level.

"Maps were shown to the tribe present at the meeting indicating the course the water would have. Individual ranchers we considered who were directly involved in plan. After much deliberation the Council approved the proposed plan.

"Mr. Winnemucca made a motion that the Council approve the plans because it would save the lands and also possible change to develop pasture on the east shore of the lake. Mr. Mauwee seconded the motion. The motion was carried."

"Mr. Rhodes motioned that estimate funds proposed for irrigation during fiscal year 1942 be approved . . . Water Master . . . $400.00." Exh. U-259 [See minutes for formal Tribal approval of plan—next page of exhibit.] [A contract for approximately $100,000 was let for this project. Exh. U-326, p. 1.]

11. Tribal Minutes state that on April 29, 1943, the Tribal Council authorized two Tribal delegates to travel to Washington, D C., to represent the Tribe at a Congressional hearing. One of those authorized to appear was the Chairman of the Council, Mr. Aleck. Exh. U-259. He testified that the Tribe had "no fish at all" and that the fishing had "died out" and that he did not want Pyramid Lake to fill up because that would "take half our irrigated pasture." Also, the thrust of the testimony of both Tribal delegates before the Congressmen was that the Tribe wants to be farmers and herdsmen. Exh. U-543, pp. 26-34 [See: pp. 33-34; p. 28 and p. 35.]

Another statement to the House of Representatives Committee in May of 1943 was:

"There is more water than the land we have. The water decree includes . . ." (Albert Aleck, Chairman of Tribal Council) Exhs. A-605, p. 28; U-543,

p. 28; [This Congressional hearing pertained to a proposed land bill to transfer some farm land to white entrymen.]

12. Tribal Minutes, June 12, 1944:

"Motion made by Mr. Francis Davis to adopt a resolution authorizing the payment of $265 to pay for water rights for irrigation on the Pyramid Lake Indian Lands as present by bill by the United States District Court of Nevada." Exh. U-259.

The above statements, including many others we have not specifically mentioned, prove the Indians and their Council had a sophisticated knowledge of the *Orr Ditch* litigation. They knew about their water rights granted under the Temporary Restraining Order of 1926, and they authorized payments to the Federal Watermaster. No doubt exists that they knew about the terms of the Truckee River Agreement of 1935 which, in substance, became the final decree in the *Orr Ditch* case. They also were aware of governmental actions with regards to the Newlands Project, and their irrigation projects. Coupled with these facts is the fact that they were aware that their water rights were dependent upon the *Orr Ditch* litigation. The Indians of Pyramid plainly told Congress in 1943 that the proposed *Orr Ditch* rights were to their satisfaction. * * *

Office - Supreme Court, U.S.
FILED
AUG 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS S. TEST *
Reno City Attorney
P. O. Box 1900
Reno, Nevada 89505
(702) 785-2054

STEVEN P. ELLIOTT
Sparks City Attorney
431 Prater Way
Sparks, Nevada 89431
(702) 356-2320

CALVIN R. X. DUNLAP
Washoe County District Attorney
P. O. Box 11130
Reno, Nevada 89510
(702) 785-4240

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF CASE	2
ARGUMENT	2
1. The issues raised by Cross-Petitioner are not novel legal issues	2
2. Not only is the opinion of the Appellate Court accurate and correct in respect to the *Orr Ditch* defendants, it is also a fair and just decision for the residents of the Truckee Meadows	3
CONCLUSION	7
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES Page

Bradburn v. *McIntosh*, 159 F.2d 925 (10th Cir. 1947) 5

Clay v. *Sun River Mining Company*, 302 F.2d 599 (10th Cir. 1962) 5

Heckman v. *United States*, 224 U.S. 413 (1912) 3

The Minnesota Mining Company v. *The National Mining Company*, 70 U.S. 332 (1866) 6

Teter v. *Irwin*, 71 S.E. 115 (W. Va. 1911) 5

United States v. *Creek Nation*, 295 U.S. 103 (1935) 5

United States v. *Orr Water Ditch Co.*, Equity No. A-3 ..... *passim*

Yankton Sioux Tribe of Indians v. *United States*, 272 U.S. 351 (1926) 5

MISCELLANEOUS

Supreme Court Rule 21.1(k) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-38

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS, City of Reno, City of Sparks and Washoe County, respectfully submit the following brief in opposition to the Pyramid Lake Tribe's Cross-Petition for a Writ of Certiorari.[1]

---

[1] Petitions for writs of certiorari to review the same decision have been filed by the State of Nevada, No. 81-2245, and by the Truckee-Carson Irrigation District (TCID), No. 81-2276. Both petitioners filed separately bound Appendices pursuant to Supreme Court Rule 21.1(k). Respondents City of Reno, Sparks and Washoe County adopt those Appendices for purposes of this Brief in Opposion. Unless otherwise noted, all references in this response will be to the Appendix filed by TCID in No. 81-2276. Such references will be indicated simply by the page number of that Appendix, *e.g.*, p. "A-15".

Supplemental materials that constitute a part of the record in this case to which reference is made in this Brief in Opposition are included in the Appendix to this brief. That Appendix will be cited as "Cities' and County's App.".

STATEMENT OF THE CASE

Respondents City of Reno, City of Sparks and Washoe County accept most of the "Statement of the Case" presented in the Cross-Petition for purposes of this response. However, one material misstatement is the claim that the Court of Appeals found that the Government's representation of the Tribe in *Orr Ditch* was improper and inadequate. Though the Court of Appeals assumed such for analysis purposes, it expressly declined to decide that the representation was improper or inadequate. (pp. A-46-47). It should also be pointed out that Reno and Washoe County are *Orr Ditch* defendants and that Sparks is in privity with *Orr Ditch* defendants.

The Cities of Reno and Sparks are within the Truckee Meadows area of Washoe County, Nevada. Most of the 170,000 citizens of Washoe County live within the Truckee Meadows and rely on *Orr Ditch* decreed water rights.

ARGUMENT

1. The issues raised by Cross-Petitioner are not novel legal issues.

For the reasons well discussed in the opinion of the Court below, Judges Skopil, Tuttle and Schroeder agree that the traditional principles of res judicata apply to the *Orr Ditch* defendants. (pp. A-31-50). With a fact-based question presented, the Cross-Petition seeks to persuade this Court to disregard long-standing res judicata principles. No sweeping legal issues are found in the question presented. Cross-Petitioner seeks avoidance of res judicata because of its claim of special facts, an argument which both courts below have rejected. After review of a comprehensive record, the Court of Appeals upheld the most material "special fact" in the case; namely, that the *Orr Ditch* defendants reasonably relied on the authority of the United States to obtain a conclusive judgment on behalf of the Pyramid Lake Tribe. The Court wrote:

> "The question is whether the *Orr Ditch* defendants were aware of a failure by the government to fulfill its responsibility to adequately represent the Tribe in litigation. The answer to this question determines whether the *Orr Ditch* defendants reasonably relied on the government's representation of the Tribe's interests. The district court found that any impropriety in the government's representation 'was unknown to the defendants in *Orr Ditch*.' Finding no. 31, R. 5602. The plaintiffs do not challenge this finding. We cannot say it is clearly erroneous. *Accordingly, the Orr Ditch defendants are entitled to rely on the final decree.*" (p. A-47) (Emphasis added.)[2]

The justifiable reliance of the *Orr Ditch* defendants is fully supported by *Heckman* v. *United States*, 224 U.S. 413 (1912), which was decided one year before the filing of the *Orr Ditch* complaint.

We are in agreement with the analysis of the Court of Appeals insofar as all of the *Orr Ditch* defendants and subsequent appropriators are afforded res judicata. (pp. A-31-50).

2. Not only is the opinion of the Appellate Court accurate and correct in respect to the Orr Ditch defendants, it is also a fair and just decision for the residents of the Truckee Meadows.

The Truckee Meadows is a water short area. Analysis of the historical water supply available in the Truckee River discloses that on the basis of present uses (without

---

[2] The District Court was also upheld in its Finding No. 27 which reads as follows:

> "That the Defendants in *Orr Ditch* and their successors in interest in this case, as well as other persons, firms, corporations, entities, governmental units, agriculture, business, industry and labor have detrimentally relied upon the terms and conditions and the final and conclusive nature of the *Orr Ditch* final decree." (p. A-105).

the attempt to impose a senior right for fishery purposes), insufficient supply has been available to meet Reno-Sparks decreed rights in 12 of 48 years in the period 1927-1974, and in 8 of 39 years in the period 1925-1967. (See Nevada's Brief in the Ninth Circuit, p. 60).

The imposition of the claimed senior fishery water right on the Truckee River would cause severe shortages in the Truckee Meadows. Irrigation uses, necessary for the survival of vegetation in the local desert environment, would be severely cut back. Farmers' crops and alfalfa would die; lawns and trees would be permitted to die; recreation areas and parks would lose their grass and trees. Even drinking water supplies would be shorted. (Transcript Volume 35, pp. 6679-83).

Forty-three trial days were expended in this case, most of which dealt with evidence addressing the "hurt" or "harm" question which would occur if an 1859 right was superimposed over all other *Orr Ditch* decree rights. The government and Cross-Petitioner attempted to show at trial that the fishing right could be superimposed over existing *Orr Ditch* final decree rights and produce no harm, thereby allowing the court, in "balancing the equities", to decline application of the doctrine of res judicata. However, in Finding 32 the trial court found:

> "The plaintiff and the Tribe have failed to sustain their burden of proof by evidence of sufficient quality and credibility to prove that no harm or 'hurt' will be sustained to the vested legal rights of priority water right holders under the *Orr Ditch* final decree if an 1859 right is superimposed over all other *Orr Ditch* decreed rights for certain minimum flow into the Truckee River for spawning and for flow into Pyramid Lake." (p. A-107).

This finding was not overturned by the Court of Appeals.

In addition, as part of consideration of "the equities" the trial judge took judicial notice that:

> ". . . if the defendants were permitted to do so . . . they would severally and collectively produce before this court credible evidence of the investment since 1944 of billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems, and other municipal and industrial facilities and operations; that there are improvements and investments of a like and similar nature which are presently underway; and there has been a very steady population growth in said area since 1944." (Cities & County's Appendix A).

The courts below were correct because equitable relief will not be granted as against innocent third persons, like the *Orr Ditch* defendants, who, in good faith, have acted on the faith of a judgment which is later challenged. *Bradburn* v. *McIntosh*, 159 F.2d 925 (10th Cir. 1947). See also *Clay* v. *Sun River Mining Company*, 302 F.2d 599 (10th Cir. 1962). See *Teter* v. *Irwin*, 71 S.E. 115 (W.Va. 1911). In *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351 (1926), this Court upheld a prior seizing of Indian property even though such seizing may have been mistaken, because the land had been open to settlement and possession by innumerable innocent purchasers. The same result was reached in *United States* v. *Creek Nation*, 295 U.S. 103 (1935).

As this Court has ruled in connection with reliance by innocent parties:

> "Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided, they should no longer be considered doubtful. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change the laws,

> without injury, as they affect the future only, but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgment." *The Minnesota Mining Company* v. *The National Mining Company*, 70 U.S. 332, 334 (1866).

The justifiable reliance on the *Orr Ditch* Decree by the *Orr Ditch* defendants, and others, outweighs the equitable claims made by the Cross-Petition, which, as stated above, also failed for lack of proof.

Virtually the entire civilization of western Nevada, including all of its people and its economy, has grown and developed in reliance on the *Orr Ditch* Final Decree. Lives and properties of tens of thousands of people, rightfully relying on the *Orr Ditch* Final Decree, will be devastated if the *Orr Ditch* Final Decree is not upheld.

CONCLUSION

The Cross-Petition of the Pyramid Lake Paiute Tribe of Indians should be denied and the decisions of the courts below in connection with the *Orr Ditch* defendants and subsequent appropriators should not be disturbed.

Respectfully submitted,

LOUIS S. TEST *
Reno City Attorney
P. O. Box 1900
Reno, Nevada 89505
(702) 785-2054

STEVEN P. ELLIOTT
Sparks City Attorney
431 Prater Way
Sparks, Nevada 89431
(702) 356-2320

CALVIN R. X. DUNLAP
Washoe County District Attorney
P. O. Box 11130
Reno, Nevada 89510
(702) 785-4240

* Counsel of Record

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

FINDINGS AND ORDER

In this case the Court takes judicial notice that all defendants have relied upon the terms, provisions, and the various water rights declared and decreed by this Court in the *Orr Water Ditch Co. Decree*, Equity No. A-3, entered the 8th day of September, 1944. That such reliance has been either direct by reason of the ownership of certain of the decreed rights by defendants or indirect by reason of the dependence of the defendants on waters the right to the use of which has been decreed to others in the *Orr Ditch Case*.

The Court further finds and judicially notices as a fact that in the area of Northwest Nevada the water rights decreed in the *Orr Ditch Case* are in an arid and dry region and that all facets of life and economy in said area have been and are dependent upon the beneficial use

of the waters of the Truckee River and its tributaries. These areas of Northwest Nevada are typical of the many arid regions of other Western States or portions thereof.

The Court further finds and judicially notices that if the defendants were permitted to do so that they would severally and collectively produce before this Court credible evidence of the investment since 1944 of billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems, and other municipal, and industrial facilities and operations; that there are improvements and investments of a like and similar nature which are presently underway; and that there has been a very steady population growth in said area since 1944.

No witnesses need or may be called by defendants to establish the precise details of such investment or of population or economic statistics or other factors set forth herein. However, any party may offer summaries as to the details of the matters covered herein.

DATED: April 2, 1976

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

No. 82-38

Office - Supreme Court, U.S.
FILED
AUG 25 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,
Cross-Respondents.

On Cross-Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Brief for Respondent Sierra Pacific Power Company in Opposition

JOHN MADARIAGA
Sierra Pacific Power Company
100 East Moana Lane
Reno, Nevada 89509
(702) 789-4228

WOODBURN, WEDGE, BLAKEY AND JEPPSON
RICHARD W. BLAKEY*
GORDON H. DEPAOLI
SUELLEN E. FULSTONE
One East First Street, Suite 1600
Reno, Nevada 89501
(702) 329-6131
Attorneys for Respondent Sierra Pacific Power Company

*Counsel of Record

BORG PRINTING COMPANY OF CALIFORNIA, 548 FIRST STREET, SAN FRANCISCO 94105

QUESTION PRESENTED

Whether the final judgment in a water rights action to which all water users on the Truckee River and its tributaries in Nevada were parties and in which the implied reserved right to a specific quantity of water for the Pyramid Lake Indian Reservation was litigated and established bars a later action claiming an implied reserved right to a larger quantity of water?

LIST OF PARTIES

The United States was plaintiff and appellant below. The Pyramid Lake Paiute Tribe of Indians intervened as a plaintiff and was also an appellant. The defendants and appellees were the Sierra Pacific Power Company,* the Truckee-Carson Irrigation District (in its own right and with others as class representatives of reclamation project rightholders), the State of Nevada, the County of Washoe, the Cities of Reno and Sparks, Washoe County, and approximately 17,000 individually named persons, firms, partnerships, and corporations located in the State of Nevada. Nevada has filed a list of the approximately 17,000 defendants in this case with the Clerk of the Court. Nev. Pet. No. 81-2245 at ii n.*.

---

*Sierra Pacific Power Company is a publicly held corporation listed on the New York Stock Exchange. It has no subsidiaries which are not wholly owned and has no affiliates.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Jurisdiction	1
Relevant Constitutional Provisions	2
Statement of the Case	2
Reasons for Denying the Cross-Petition	5
I The Ninth Circuit Correctly Decided the Issues Presented by the Cross-Petition	5
A. The Cause of Action Here Is Part of the Same Cause of Action in *Orr Ditch*	5
B. The Tribe Was Not Denied Due Process	7
C. The Res Judicata Defense Is Available to Appropriators Who Were Not Parties to *Orr Ditch* But Who Have Relied on the *Orr Ditch* Decree	12
II The Issues Presented Here Are Controlled by Prior Decisions of This Court	14
III There Is Relief Available to the Tribe for Any Breach of Fiduciary Duty by the United States	15
Conclusion	17
Appendix	1a

TABLE OF AUTHORITIES

Cases	Pages
Arizona v. California, 373 U.S. 546 (1963)	8, 14
Armstrong v. Manzo, 380 U.S. 545 (1965)	9
Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942)	13
Blau v. Lehman, 368 U.S. 403 (1962)	2
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	13
Cappaert v. United States, 426 U.S. 128 (1976)	6, 14
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	14
Cromwell v. County of Sacramento, 94 U.S. 351 (1877)	6
Faulkner v. Gibbs, 338 U.S. 267 (1949)	2
Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	14
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)	8
FPC v. Oregon, 349 U.S. 435 (1955)	14
Glasser v. United States, 315 U.S. 60 (1942)	11
Griffin v. Griffin, 327 U.S. 220 (1946)	9
Hansberry v. Lee, 311 U.S. 32 (1940)	8, 11
Hanson v. Denckla, 357 U.S. 235 (1958)	9
Heckman v. United States, 224 U.S. 413 (1912)	8, 14
Holloway v. Arkansas, 435 U.S. 475 (1978)	11
Kerrison v. Stewart, 93 U.S. 155 (1876)	9, 10, 12, 15, 16
Kersh Lake Drainage District v. Johnson, 309 U.S. 485 (1940)	8, 9, 10, 12, 15, 16
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)	10
Link v. Wabash R. R. Co., 370 U.S. 626 (1962)	11,16
Lugar v. Edmondson Oil Co., ... U.S. .... (No. 80-1730, June 25, 1982)	8

TABLE OF AUTHORITIES

Pages

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 9

Pennsylvania R. R. Co., v. Illinois Brick Co., 297 U.S. 447 (1936) 10

Postal Teleg. Cable Co. v. City of Newport, 247 U.S. 464 (1918) 8

Proctor v. Jennings, 6 Nev. 83 (1870) 12

Schroeder v. City of New York, 371 U.S. 208 (1962) .. 9

Schuykill Fuel Corp. v. B&C Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929) 6

United States v. California & Oregon Land Co., 192 U.S. 355 (1904) 7, 8, 14

United States v. District Court for Eagle County, 401 U.S. 520 (1971) 14

United States v. Minnesota, 270 U.S. 181 (1926) 8, 14

United States v. Powers, 305 U.S. 527 (1939) 14

United States v. "The Haytian Republic," 154 U.S. 118 (1894) 6

United States v. Walker River Irr. Dist., 11 F. Supp. 158 (D.Nev. 1935), *rev'd*, 104 F.2d 334 (9th Cir. 1939) 8

Von Moltke v. Gillies, 332 U.S. 708 (1948) 11

Walker v. City of Hutchinson, 352 U.S. 112 (1956) 9

Winters v. United States, 207 U.S. 564 (1908)....3, 8, 13, 14, 16

Wood v. Georgia, 450 U.S. 261 (1981) 11

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 9

TABLE OF AUTHORITIES

STATUTES

	Pages
25 U.S.C. §§ 70-70v-3 (1976 and Supp. IV 1980)	16
42 U.S.C. § 1983 (Supp. IV 1980)	8
43 U.S.C. §§ 371-526 (1976 and Supp. IV 1980)	2

MISCELLANEOUS

Fed. R. Civ. P. 23(a)	11
Restatement of Judgments § 61 (1942)	6, 7
Restatement (Second) of Judgments § 42(d) (1982)	10, 11
Restatement (Second) of Trusts § 170 (1957)	9
1 S. Weil, Water Rights in the Western States § 302 (3rd ed. 1911)	12
1B J. Moore, Moore's Federal Practice ¶ 0.406[2] (2d ed. 1982)	16

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-38

PYRAMID LAKE PAIUTE TRIBE OF INDIANS
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.
Cross-Respondents.

On Cross-Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit[1]

Brief for Respondent Sierra Pacific Power Company in Opposition

JURISDICTION

Sierra Pacific Power Company ("Sierra Pacific") adopts the statement of jurisdiction in the Cross-Petition. The

1. Petitions for writs of certiorari to review the same decision have been filed by the State of Nevada, No. 81-2245, and by the Truckee-Carson Irrigation District (TCID), No. 81-2276. Both petitioners filed separately bound Appendices pursuant to Supreme Court Rule 21.1(k). Respondent Sierra Pacific Power Company adopts those Appendices for purposes of this Brief. Unless otherwise noted, all references in this Brief will be to the Appendix filed by TCID in No. 81-2276. Such references will be indicated simply by the page number of that Appendix, *e.g.*, "A-15." Nevada's Appendix in No. 81-2245 will be cited as "Nev. App." Supplemental materials which are part of the record in this case and to which reference is made in this Brief are included in the Appendix to this Brief. That Appendix will be cited as "SPPCo. App."

Tribe's Cross-Petition was received on July 12, 1982. Pursuant to Supreme Court Rule 29.3, the Clerk extended the time to file this opposition to August 24, 1982.

RELEVANT CONSTITUTIONAL PROVISIONS

No Constitutional provisions are directly involved.

STATEMENT OF THE CASE[2]

The Pyramid Lake Indian Reservation was set aside in 1859 and confirmed by an executive order signed by President Grant in 1874. In 1902, Congress enacted the Reclamation Act. Pub. L. No. 57-161, 32 Stat. 388, 43 U.S.C. §§ 371-526. Shortly thereafter, the Secretary of the Interior withdrew land in Western Nevada for the first reclamation project under the Act. This became known as the Newlands Project. A-3 to A-4, A-96, A-99.

The Newlands Project and the Pyramid Lake Reservation each received water from the Truckee River. The flow of the Truckee River and its tributaries then, as now, fluctuated greatly. At times there was insufficient water available for all persons claiming water rights, including the Project and Reservation. For this reason, on March 3, 1913, the United States commenced a water rights action entitled *United States v. Orr Water Ditch Co.*, Equity No. A3 (1944) (*"Orr Ditch"*). Nev.App.9a to 10a. *Orr Ditch* was intended to be a general all-inclusive adjudication of all rights and claims to the waters of the Truckee River. A-33, A-100.

---

2. The court of appeals applied the "clearly erroneous" standard to the district court's findings of fact. In those instances where there were mixed findings of law and fact, the court of appeals independently reviewed the evidence to assess those findings. A-20. In no instance did the court of appeals disagree with the district court's findings. This Court cannot disturb the concurrent findings of the courts below unless they are shown to be clearly erroneous. Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); Blau v. Lehman, 368 U.S. 403, 409 (1962).

In *Orr Ditch*, the Tribe was represented by the United States. A-6, A-99. It was the intention of the United States to assert as large a water right as possible for the Pyramid Lake Reservation based on the implied reserved water rights doctrine recognized by this Court in *Winters v. United States*, 207 U.S. 564 (1908). A-6, A-100. In alleging the purpose of reservation, the United States in its amended complaint in *Orr Ditch* stated that the government was "desirous of protecting [the] Indians . . . in their homes, fields, pastures, *fishing*, and their use of said lands and waters." Nev. App. 6a. [Emphasis added.]

On February 13, 1926, after extensive litigation, a temporary restraining order was entered in *Orr Ditch*. The final judgment in the *Orr Ditch* action was entered some 18 years later on September 8, 1944. A-9, A-15, A-101. The final decree included an implied reserved right for the Pyramid Lake Indian Reservation to approximately 30,000 acre-feet of water with an 1859 priority. A-103.

From the beginning of *Orr Ditch* in 1913 to its conclusion in 1944, the Tribe possessed both the actual and the legal ability and capacity to intervene to assert a claim to additional water. A-101. During all of this period of time, the Tribe, as well as others, was aware of problems with the fishery, spawning runs, the lowering of Pyramid Lake, and diminished water flow. A-10 to A-14, A-101. The temporary restraining order was entered for the purpose, among others, of thoroughly testing before the entry of a final decree the preliminary water rights determination and the operation of the Truckee River thereunder. The proceedings were expressly left open for any person affected by the order to apply for its amendment, alteration or modification. A-101.

No attempt was made by the Tribe to intervene in *Orr Ditch*. No application was made by the Tribe for any alteration or modification of the temporary order. A-101. No appeal was taken by any party from the final judgment. A-15.

Northwest Nevada is an arid region. All facets of life in the area are therefore dependent upon the beneficial use of the waters of the Truckee River and its tributaries. SPPCo. App. 1a to 2a. All of the defendants in this action have relied directly and indirectly upon the terms, provisions and water rights declared in the *Orr Ditch* final judgment. A-105. Since September 8, 1944, when that final judgment was entered, billions of dollars have been spent on plants, agriculture, schools, parks, playgrounds and water distribution facilities, to name just a few. SPPCo. App. 2a. The United States and the Tribe also have accepted and enjoyed the benefits of the water rights and priorities decreed in *Orr Ditch*. A-104.

In December of 1973, the United States filed the present action suing both in its own right and in its fiduciary capacity on behalf of the Tribe. The Tribe was subsequently permitted to intervene. A-2 to A-3. Both the United States and the Tribe sought a decree quieting title to an implied reserved water right sufficient to maintain the level of Pyramid Lake and the lower reaches of the Truckee River for fishery purposes. A-2. The trial court held the claim by the Tribe and the United States to additional water for the Pyramid Lake Indian Reservation barred by the *Orr Ditch* final judgment. A-108.

On appeal, the Ninth Circuit affirmed in part and reversed in part. It held that, except for the Truckee-Carson Irrigation District ("TCID"), all defendants could successfully assert the *Orr Ditch* judgment as a bar. A-48 to A-50. With

respect to TCID, the court of appeals simply held that adversity under the pleadings, an essential element of the defense of res judicata, had not been present in *Orr Ditch* between TCID and the Tribe. A-51 to A-55.

The case was then remanded to the district court for a determination as to the existence of a reserved water right for fishery purposes as between TCID and the Tribe. If such a right exists, the district court must find a means of satisfying that right from the Reclamation Project water right in a manner that would minimize hardship on both the Tribe and the Project. A-55 to A-56, A-59 to A-60.

REASONS FOR DENYING THE CROSS-PETITION

I. THE NINTH CIRCUIT CORRECTLY DECIDED THE ISSUES PRESENTED BY THE CROSS-PETITION.

In affirming the res judicata bar, the court of appeals decided that the cause of action asserted by the United States and the Tribe was the same as the cause of action adjudicated in *Orr Ditch*. A-31 to A-34. It held that, in *Orr Ditch* the Tribe was in privity with the United States. A-45. It held that giving res judicata effect to the *Orr Ditch* judgment and holding the Tribe bound would not deprive the Tribe of due process. A-46 to A-47. It also held that subsequent appropriators can rely on the *Orr Ditch* decree as a final judgment. A-49, A-50. These issues were correctly decided and no review is merited.

A. The Cause of Action Here Is Part of the Same Cause of Action in *Orr Ditch*.

Among the claims adjudicated in *Orr Ditch* was a claim for an implied reserved water right for the Pyramid Lake Paiute Indian Reservation. A-32. The cause of action in this case also seeks the adjudication of such a right. A-32. The causes of action are one and the same.

A cause of action for an implied reserved water right for any federal reservation is established by proof only of the fact, date and purpose of the reservation. *See, Cappaert v. United States,* 426 U.S. 128, 138 (1976) and cases cited therein. As plaintiff in *Orr Ditch,* the United States alleged and proved the fact, date and purpose of the Pyramid Lake Paiute Indian Reservation. The complaint in this action also and necessarily alleges the fact, date and purpose of reservation. The court of appeals correctly held the cause of action thus stated to be part of the same cause of action previously adjudicated in *Orr Ditch.*

The Tribe complains that the court of appeals improperly applied retroactively some new and more expansive standard for the identity of causes of action. That argument is mistaken and misleading. It was well established long before *Orr Ditch* that a final judgment on the merits of an action precludes the parties or their privies from relitigating matters that were or could have been raised in that action. *See, e.g., Cromwell v. County of Sacramento,* 94 U.S. 351, 352-53 (1877). It is application of that doctrine that bars the Tribe here.

The Tribe advocates the "same evidence" test set forth in *United States v. "The Haytian Republic,"* 154 U.S. 118, 125 (1894), and Section 61 of the Restatement of Judgments (1942), as that in use during the period of *Orr Ditch.*[3] The focus of the same evidence test is on the evi-

---

3. The "same evidence" test was not the only method used in the period of time that the *Orr Ditch* action was pending for determining identity of causes of action. For example, in Schuykill Fuel Corp. v. B&C Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929), Cardozo set forth an impairment of rights test, *i.e.* whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second. Even under that test, this action would be barred. Moreover,

dence necessary to prove the right to relief, as distinguished from the evidence necessary to prove the relief itself. As noted in Comment a to Section 61, if a plaintiff suffers harm to his person and property in an automobile collision and brings an action for the harm to his person, a judgment in that action precludes him from maintaining a second action for the harm to his property.

The same principle applies here. Throughout, the Tribe has failed to distinguish between the facts necessary to sustain the cause of action for an implied water right and the facts necessary to prove the relief, *i.e.*, the quantity of water. As the court of appeals noted, the evidence necessary to quantify the water needed to sustain the fishery may be different from the evidence necessary to quantify water needed for irrigation. However, the difference in that evidence does not create different causes of action. The Tribe's cause of action for an implied reserved water right was litigated in *Orr Ditch*. Under any standard, the attempt to relitigate that right here was properly held barred.

B. The Tribe Was Not Denied Due Process.

The "due process" question in this case is based solely on the Tribe's claim that it was represented inadequately in *Orr Ditch* and that, therefore, an exception to the ordinary rules of res judicata should be made permitting the Tribe to relitigate its water rights claim.[4] On the facts of this matter as determined by the lower courts, the Tribe was not

---

prior to *Orr Ditch*, this Court had already taken an expansive view of res judicata in actions involving claims to property, holding that the United States was required to assert in a single action all the grounds it had for claiming certain land. United States v. California & Oregon Land Co., 192 U.S. 355, 359 (1904).

4. The Tribe's contention that only government officials and not private representatives are limited by due process constraints (Tribe's Cross-Petition at 13 text and ns. 7 and 8) misses the point.

denied due process and no exception to res judicata may be made.

Procedural due process, that is, notice and an opportunity to be heard, was afforded the Tribe in *Orr Ditch*. The Tribe was represented in *Orr Ditch* by the United States, an entity with full power and authority to represent it. *Heckman v. United States*, 224 U.S. 413, 444-46 (1912); *United States v. Minnesota*, 270 U.S. 181, 194 (1926); *United States v. California and Oregon Land Co.*, 192 U.S. 355, 358 (1904). The United States had adequate notice and opportunity to litigate all the issues and claims encompassed by *Orr Ditch*. The requirements of procedural due process were fully met.

The Tribe's true complaint is that no one, including the United States, knew what the law on *Winters* rights might be 60 years after *Orr Ditch* was begun and 29 years after it ended.[5] The requirement of procedural due process does

---

Admittedly the cases involving alleged deprivations of rights guaranteed by the Fourteenth Amendment and in actions under 42 U.S.C. § 1983, "state action" or action "under color of state law" must be involved. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978); Lugar v. Edmondson Oil Co., ... U.S. ..... (No. 80-1730, June 25, 1982). In this res judicata context, the due process question does not arise because the Tribe was represented by "government officials" in *Orr Ditch* (Tribe's Cross-Petition at 13), it arises because of judicial action which seeks to enforce the *Orr Ditch* judgment here. Hansberry v. Lee, 311 U.S. 32, 41 (1940); Kersh Lake Drainage Dist. v. Johnson, 309 U.S. 485, 490 (1940); Postal Teleg. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918).

5. Throughout the lengthy *Orr Ditch* proceedings there was substantial uncertainty as to the scope of the *Winters* doctrine. Its application to an executive order reservation was some 36 years away. *See* United States v. Walker River Irrigation District, 11 F.Supp. 158, 159 (D.Nev. 1935), *rev'd*, 104 F.2d 334, 336 (9th Cir. 1939). Its express extention to other federal reservations by Arizona v. California, 373 U.S. 546,601 (1963), was 50 years away. Furthermore, *Winters* contained language that implied, if it did not expressly state, that the purpose of Indian reservations was to make farmers of the Indians. *Winters*, 207 U.S. at 576.

not, and could not, impose such an impossible burden.[6]

In determining that there had been no denial of due process in *Orr Ditch*, the court of appeals assumed, but expressly did not decide, that the government's representation of the Tribe in *Orr Ditch* was improper and inadequate.[7] A-46 to A-47. The court's focus then correctly shifted to the knowledge, if any, of the *Orr Ditch* defendants of any such inadequate representation. *See, e.g., Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 491 (1940), *Kerrison*

---

6. The cases relied upon by the Tribe do not apply. Armstrong v. Manzo, 380 U.S. 545 (1960), Schroeder v. City of New York, 371 U.S. 208 (1962), Walker v. City of Hutchinson, 352 U.S. 112 (1956), and Griffin v. Griffin, 327 U.S. 220 (1946), did not involve claim preclusion and in each the party claiming inadequate notice in a prior proceeding had not been represented in that litigation by anyone at all. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), and Hanson v. Denckla, 357 U.S. 235 (1958), are simply minimum contacts cases. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the question involved the kind of notice a beneficiary was to be provided of a proceeding which would bar the beneficiary's rights "to have the trustee answer for negligent or illegal impairments of [his] interests." 339 U.S. at 313. *Mullane* does not hold or even remotely suggest that the rights and interests of a trust beneficiary once determined in legal proceedings between the trustee and third parties are subject to relitigation because the beneficiary was not given notice of, or did not participate directly in, the proceedings.

7. The Tribe's Cross-Petition asserts that the court of appeals found that the "government's representation of the Tribe in *Orr Ditch* was improper and inadequate." Tribe's Cross-Petition at 8. That simply is not true. Based upon the assumption that it had made at the outset (A-46 to A-47), the court of appeals subsequently noted that the government's representation was "analogous to that of a faithless fiduciary." A-48 to A-49. Referring to the Restatement (Second) of Trusts § 170 comments p, q, and r (1957), the court of appeals also noted that by representing the Tribe and TCID in *Orr Ditch* the "government compromised its duty of undivided loyalty to the Tribe." A-52. The court never, at any point, made any determination that that compromise resulted in inadequate representation of the Tribe in *Orr Ditch*. The trial judge specifically found no such improprieties. A-107 to A-108.

v. Stewart, 93 U.S. 155, 160 (1876), Restatement (Second) of Judgments §42 (1982).[8] In that regard, the court of appeals noted that the trial judge found that any impropriety in the Government's representation in *Orr Ditch* was unknown to the defendants in *Orr Ditch*. A-47. It stated that it could not determine that that finding was clearly erroneous. A-47. Moreover, it specifically noted that the plaintiffs did not challenge that finding.[9] A-47.

Once inadequate representation is assumed, the relevant inquiry is whether the defendants knew. This Court has taken an even more restrictive approach in *Kersh* and *Kerrison*. In these cases a beneficiary was held bound by a judgment in an action in which he was represented by his trustee, an exception being made only where there had been fraud or collusion between the trustee and the adverse party.

None of the cases cited by the Tribe alter the rule established by this Court in *Kersh* and *Kerrison* or support the application of a different rule in the present case. Cases involving the Sixth Amendment's guarantee of the effective

---

8. Since the court of appeals' decision, the Restatement (Second) of Judgments has been finally adopted by the American Law Institute. The substance of the tentative drafts relied upon by the court of appeals did not change, but the numbering of the sections did. References herein will be to the numbering used in the adopted version.

9. Having failed to challenge that finding on appeal, the Tribe cannot challenge it here. Pennsylvania R.R. Co. v. Illinois Brick Co., 297 U.S. 447, 463 (1936); cf. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951). They attempt to do so, however, allegedly in the context of the burden of proof at trial. The "essential elements" of res judicata, (1) a valid and final judgment on the merits, (2) subsequent litigation on the same cause of action, and (3) involving the same parties or those in privity with them, were established by the defendants. The Tribe had the burden of proving an exception to the general rule once those essential elements were prima facie established.

assistance of counsel in criminal cases simply do not apply.[10] In the res judicata context the trustee-beneficiary situation is analogous to those civil cases where a party is inadequately represented by an attorney. In such cases the inadequately represented party is nonetheless bound by the result. Any different rule visits the sins of the party's lawyer upon the innocent opposition. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962), and cases cited therein.

Class action cases are also inapplicable. Certainly, the rule in class action cases is necessarily different from the rule to be applied in trustee-beneficiary cases. Class actions were devised as a means of permitting litigation to proceed even though not all interested persons could be joined. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). The authority to represent the "class" springs solely from the substantial "identity of interest" shared by the named parties and the unnamed class members. Rule 23(a), Fed.R.Civ.P; Restatement (Second) of Judgments § 42(d), Comment e (1982).

The authority of the United States to represent the Tribe in *Orr Ditch* was not based upon any "identity of interest." That authority was vested in the United States as sovereign and as trustee for its Indian wards.[11] In that context, the role and the duties and obligations of the United States were analogous to those of any trustee.

---

10. Wood v. Georgia, 450 U.S. 261 (1981), Holloway v. Arkansas, 435 U.S. 475 (1978), Von Moltke v. Gillies, 332 U.S. 708 (1948) and Glasser v. United States, 315 U.S. 60 (1942).

11. Its representation of an Indian tribe is much different than its representation of public interests generally. The reference in Restatement (Second) of Judgments § 42, Comment f, relied upon by the Tribe, is to those situations where an action by or against a public agency or official would bar an action by ordinary citizens or taxpayers. It has nothing to do with those situations where the United States acts as trustee for its Indian wards.

Significantly, in this regard, a class representative cannot be sued for inadequate representation. An exception from the application of res judicata in the class action context may thus be appropriate. No similar reason for an exception to the res judicata bar can be found in the trustee-beneficiary context. A trustee can be sued for the breach of its fiduciary duty in the failure to represent a beneficiary adequately. In that context, the appropriate rule is that already adopted by this Court in *Kersh* and *Kerrison* which holds that, in the absence of fraud or collusion, a party represented by a trustee in an action is bound by the judgment in that action. Applying that law, the court of appeals correctly held the Tribe barred by the final judgment in *Orr Ditch*.

C. The Res Judicata Defense Is Available to Appropriators Who Were Not Parties to *Orr Ditch* but Who Have Relied on the *Orr Ditch* Decree.

The final *Orr Ditch* decree was entered in 1944. Since that time, additional appropriative water rights have been acquired pursuant to Nevada law by various individuals and entities. These subsequent appropriators acquired their rights subject to the rights adjudicated in *Orr Ditch*. 1 S. Weil, *Water Rights In The Western States* § 302 at 313-314 (3rd ed. 1911); *Proctor v. Jennings*, 6 Nev. 83, 88 (1870).

Because the subsequent appropriators took the stream as they found it, they acquired their rights in reliance on the finality and the substance of the judgment in *Orr Ditch*. The Ninth Circuit held that they were entitled to that reliance and to the protection of the principles of res judicata. A-49, A-50. The Tribe seeks review of that determination. No such review is merited.

The *Winters* "implied reservation of water rights" doctrine entitles a reservation to a certain quantity of water. The quantity of water reserved to the Pyramid Lake Paiute Indian Reservation was litigated in *Orr Ditch*. Neither the Tribe nor the United States can be permitted to relitigate that quantity as against either the parties to *Orr Ditch* or non-party subsequent appropriators relying on the *Orr Ditch* decree.[12]

Clearly, under the circumstances, any other result is untenable. As noted by the Ninth Circuit, *Orr Ditch* was "intended by all concerned lawyers, litigants and judges as a general all-inclusive water adjudication which sought to adjudicate all rights and claims" to the waters of the Truckee River. Its objective was a decree upon which all parties could rely. A-33, A-100. To achieve that end, *Orr Ditch* was made an adjudication that approximated a statutory *in rem* proceeding. The complaint was framed in the broadest possible way to assert the court's jurisdiction over all water users on the river. Both individual notice and widespread publicity of the action were provided. A-49.

Considering those circumstances, the court of appeals held that non-party subsequent appropriators who had relied on the finality of the comprehensive *Orr Ditch* adjudication were entitled to do so. The court recognized that it would be both unjust and unworkable from a practical standpoint to permit the party defendants in *Orr Ditch* to rely on the judgment and not permit subsequent appropriators[13] to do

---

12. Under the prevailing law, nonparties may prevent that relitigation. Blonder-Tongue Laboratories v. University of Ill. Foundation, 402 U.S. 313, 323-25 (1971); Bernhard v. Bank of America, 122 P.2d 892, 894-95 (Cal. 1942).

13. It is doubtful that the Tribe's position would be improved even if it could assert its alleged fishery right against subsequent appropriators because those rights are "relatively few and minor."

the same. Furthermore, as the court of appeals correctly observed, such an exception would simply "make it impossible ever finally to quantify a reserved water right." A-50.

II. THE ISSUES PRESENTED HERE ARE CONTROLLED BY PRIOR DECISIONS OF THIS COURT.[14]

The issues raised by the Cross-Petition have already been decided many times by this Court and those decisions are controlling. This Court has many times defined a cause of action for an implied reserved water right as the fact, date and purpose of reservation. *See, e.g., Cappaert v. United States,* 426 U.S. 128, 138 (1976); *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 805 (1976); *United States v. District Court for Eagle County,* 401 U.S. 520, 522-23 (1971); *Arizona v. California,* 373 U.S. 546, 601 (1963); *FPC v. Oregon,* 349 U.S. 435 (1955); *United States v. Powers,* 305 U.S. 527 (1939); *Winters v. United States,* 207 U.S. 564 (1908). This Court has also held many times that an Indian tribe is ordinarily bound by a judgment entered in an action in which it was represented by the United States as its trustee. *See, e.g., Heckman v. United States,* 224 U.S. 413, 444-46 (1912); *United States v. Minnesota,* 270 U.S. 181, 194 (1926); *United States v. California & Oregon Land Co.,* 192 U.S. 355, 358 (1904).

Furthermore, this Court has already decided more than once that a beneficiary represented in litigation by a trus-

---

Brief for Respondent Pyramid Lake Paiute Tribe of Indians in Opposition to Petitions of Nevada and TCID for Writs of Certiorari at 20.

14. As was recently noted, "there is little to be added to the doctrine of res judicata as developed in the case law of this Court." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 2427 (1981).

tee is bound by the final judgment entered in that litigation unless there is fraud or collusion between the trustee and the adverse party. *See, e.g., Kersh,* 309 U.S. at 491; *Kerrison,* 93 U.S. at 160. No issue of fraud or collusion was raised here. In fact, the trial court found and it was uncontested on appeal, that the *Orr Ditch* defendants had no knowledge of any improper or inadequate representation of the Tribe's interest by the United States. A-47.

The Tribe's Cross-Petition presents no new or substantial question which justifies discretionary review by this Court. Under the controlling decisions of this Court, the Tribe is bound by the *Orr Ditch* determination.

III. THERE IS RELIEF AVAILABLE TO THE TRIBE FOR ANY BREACH OF FIDUCIARY DUTY BY THE UNITED STATES.

The decision of the court of appeals is not only correct and controlled by previous decisions of this Court, it is also fair. The Tribe seeks to avoid the bar of the final judgment in *Orr Ditch* based upon an alleged breach of fiduciary duty by the United States in representing it in that litigation. The remedy sought by the Tribe, however, is the relitigation of the size of its 1859 implied reserved water right. That remedy runs not against the United States, the alleged wrongdoer, but against the *Orr Ditch* defendants and subsequent appropriators, innocent persons who have relied and who continue to rely on the *Orr Ditch* judgment and who neither participated in nor were even aware of any breach of duty.

It is the established rule that, in the absence of fraud or collusion between the trustee and the adverse party, neither the faithless trustee nor the injured beneficiary can shift

the beneficiary's losses to the adverse party.[15] *Kersh*, 309 U.S. at 491; *Kerrison*, 93 U.S. at 160; *cf. Link*, 370 U.S. at 634 n.10. That is a rule of fundamental fairness as well as of due process.

If the United States breached its fiduciary duty to the Tribe, the Tribe's recourse ought to be against the United States. That remedy is and has been available to the Tribe and has, in fact, been used. Congress has provided remedies and established a procedure for obtaining and recovering the value of any rights lost by such breach. Indian Claims Commission Act, 25 U.S.C. §§ 70-70v-3 (1976 and Supp. IV 1980). If, in *Orr Ditch*, the United States breached some duty it owed the Tribe, the Tribe certainly has an action for that breach. In fact, on July 23, 1975, the Tribe was awarded $8,000,000 by the Indian Claims Commission "for the loss of the Tribe's alleged . . . *Winters* reserved water rights for the Pyramid Lake fishery and other alleged water rights." A-106 to A-107.

In addition, the United States has the power to allocate and spend federal funds to restore the fishery artificially and it has done just that. Between 1973 and 1976, some $32,000,000 in federal funds alone, not including expenditures by the State of Nevada, were spent to restore the Pyramid Lake fishery. A-106. Furthermore, since the trial and during the appeal in this action, Congress appropriated and spent an additional $2.3 million to construct a second fish hatchery at Pyramid Lake. It has appropriated $2.1 million for operation of the Reservation fish hatcheries for fiscal years 1981 and 1982.

---

15. "Due process" not only limits a court's power to give effect to a judgment, it also limits the power to refuse effect to such a judgment or to restrict that effect. 1B J. Moore, Moore's Federal Practice ¶ 0.406[2] at 906-07 (2d ed. 1982).

Relief is available and has in fact been provided to the Tribe from the United States. Additional relief at the expense of innocent parties would be neither fair nor legally justifiable.

CONCLUSION

For all of these reasons, it is respectfully submitted that this Court should, in the exercise of its discretion, decline review.

Respectfully submitted this 24th day of August, 1982.

JOHN MADARIAGA
Sierra Pacific Power Company
WOODBURN, WEDGE, BLAKEY AND JEPPSON
RICHARD W. BLAKEY*
GORDON H. DEPAOLI
SUELLEN E. FULSTONE
One East First Street, Suite 1600
Reno, Nevada 89501
Attorneys for Respondent Sierra Pacific Power Company

The multiple respondents represented by Leslie B. Gray, Albert A. Alcorn et al. (the "Group 19" defendants), join in this Brief.

LESLIE B. GRAY
3540 Wedekind Road
Sparks, Nevada 89431

---

*Counsel of Record

Appendix

RECEIVED AND FILED
Apr 2 3:26 PM '76
John A. Porter, Clerk
By Ophelia Robey, Deputy

United States District Court
District of Nevada

• • •

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,
Defendants.

FINDINGS AND ORDER

In this case the Court takes judicial notice that all defendants have relied upon the terms, provisions, and the various water rights declared and decreed by this Court in the *Orr Water Ditch Co. Decree,* Equity No. A-3, entered the 8th day of September, 1944. That such reliance has been either direct by reason of the ownership of certain of the decreed rights by defendants or indirect by reason of the dependence of the defendants on waters the right to the use of which has been decreed to others in the *Orr Ditch Case.*

The Court further finds and judicially notices as a fact that in the area of Northwest Nevada the water rights decreed in the *Orr Ditch Case* are in an arid and dry region

and that all facets of life and economy in said area have been and are dependent upon the beneficial use of the waters of the Truckee River and its tributaries. These areas of Northwest Nevada are typical of the many arid regions of other Western States or portions thereof.

The Court further finds and judicially notices that if the defendants were permitted to do so that they would severally and collectively produce before this Court credible evidence of the investment since 1944 of billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems, and other municipal, and industrial facilities and operations; that there are improvements and investments of a like and similar nature which are presently underway; and that there has been a very steady population growth in said area since 1944.

No witnesses need or may be called by defendants to establish the precise details of such investment or of population or economic statistics or other factors set forth herein. However, any party may offer summaries as to the details of the matters covered herein.

DATED: April 2, 1976

J. BLAINE ANDERSON
J. Blaine Anderson
United States District Judge

Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-38

In The

Supreme Court of the United States

October Term, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PEITIONER'S REPLY BRIEF

Robert S. Pelcyger
Fredericks & Pelcyger
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683

Scott B. McElroy
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Michael R. Thorp
Eisenhower, Carlson, Newlands, Reha, Henriot & Quinn
1200 First Interstate Plaza
Tacoma, Washington 98402
(206) 572-4500

Attorneys for Cross-Petitioner Pyramid Lake Paiute Tribe of Indians

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities i

Argument:

I. The *Orr Ditch* Proceedings Results in a Violation of Procedural Due Process and Therefore Cannot Be Accorded Finality. 1

II. Denying the Conditional Cross-Petition Would Not Serve Any Useful Purpose if Either Petition is Granted. 3

III. The Tribe Did Not Have a Full and Fair Opportunity to Litigate Its Cause of Action for a Water Right for Fishery Purposes. 4

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Bell v. Burson, 402 U. S. 535 (1971) 6

Board of County Commissioners v. Seber, 318 U. S. 705 (1943) 8

Delaware Tribal Business Committee v. Weeks, 430 U. S. 73 (1977) 5

Ewart v. Bluejacket, 259 U. S. 129 (1922) 8

Expert Electric, Inc. v. Levine, 554 F. 2d 1227 (2d Cir. 1977), *cert. denied*, 434 U. S. 903 10

Goldberg v. Kelly, 397 U. S. 254 (1970) 4

TABLE OF AUTHORITIES—Continued

Pages

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975) 8

Kremer v. Chemical Construction Company, — U. S. —, 102 S. Ct. 1183, 72 L. Ed. 2d 262 (No. 80-6045, May 17, 1982) 2, 3

KVOS v. Associated Press, 299 U. S. 269 (1936) 10

Link v. Wabash R. R. Co., 370 U. S. 626 (1962) 4

Logan v. Zimmerman Brush Co., — U. S. —, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (No. 80-5950, Feb. 24, 1982) 1, 23

Morrisey v. Brewer, 408 U. S. 471 (1974) 4

Morton v. Ruiz, 415 U. S. 199 (1974) 4

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 7

New Mexico v. Aamodt, 537 F. 2d 1102 (10th Cir. 1976), *cert. denied*, 429 U. S. 1121 9

Oneida Indian Nation v. County of Oneida, 414 U. S. 661 (1974) 8

Procunier v. Navarette, 434 U. S. 555 (1978) 5

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U. S. 102 (1968) 8

Public Utilities Comm'n. v. Pollack, 343 U. S. 451 (1952) 4

Ross v. Internat'l. Broth. of Electric Workers, 634 F. 2d 453 (9th Cir. 1980) 10

TABLE OF AUTHORITIES—Continued

	Pages
Santa Clara Pueblo v. Martinez, 435 U. S. 49 (1978)	5, 9
Schroeder v. City of New York, 371 U. S. 208 (1962)	7
Smith v. Ayer, 101 U. S. 320 (1880)	9
Stephens v. Cherokee Nation, 174 U. S. 445 (1899)	5
Tiger v. Western Investment Co., 221 U. S. 286 (1911)	8
United States v. Blackfeet Tribe, 364 F. Supp. 192, 369 F. Supp. 562 (D. Mont. 1973)	9
United States v. Kagama, 118 U. S. 375 (1886)	8
United States v. Minnesota, 270 U. S. 181 (1926)	9
United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev.)	passim
United States v. Rickert, 188 U. S. 432 (1903)	8
United States v. Texas, 143 U. S. 621 (1892)	9
United States v. U. S. Fidelity & Guarantee Co., 309 U. S. 506 (1940)	9
United States v. Winnebago Tribe of Indians, 542 F. 2d 1002 (8th Cir. 1976)	9
Washington v. Fishing Vessel Ass'n., 443 U. S. 658 (1979)	4
Western Union Telegraph Co. v. Foster, 247 U. S. 105 (1918)	7
Zenith Radio Corp. v. Hazeltine Research, 395 U. S. 100 (1969)	7

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISION, STATUTE, AND RULES:

	Pages
U. S. Constitution, Amendment V	5
Nev. Rev. Stat. § 704.230	6
Sup. Ct. Rule 19.5	4
Sup. Ct. Rule 20.5	4
Sup. Ct. Rule 21.1	5

CROSS-PETITIONER'S REPLY BRIEF

The purposes of this Reply Brief are to direct the Court's attention to two of its recent decisions that strongly support the Pyramid Like Tribe's Cross-Petition and to respond to the Cross-Respondents' Briefs in Opposition.

ARGUMENT

I.

The Orr Ditch proceedings resulted in a violation of procedural due process and therefore cannot be accorded finality.

Logan v. Zimmerman Brush Co., — U. S. —, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (No. 80-5950, February 24, 1982), is directly on point with respect to the constitutional inadequacy of the *Orr Ditch* proceedings. In *Logan*, a physically handicapped employee filed a complaint with a state agency charging that his employment had been terminated unlawfully. The agency inadvertently failed to convene a fact-finding conference within the statutorily prescribed period. The State Supreme Court held that the agency's failure to comply with the statutory deadline resulted in the extinguishment of the employee's cause of action.

This Court reversed, holding that the employee's cause of action is a property interest entitled to due process protection and that the employee's cause of action could not be extinguished unless he was provided an opportunity to present his claim at a meaningful time and in a meaningful manner. Since the employee was denied that opportunity as a result of the state agency's failure to act within the statutorily prescribed period, the State statute as interpreted and applied by the State Supreme Court was

held to constitute a denial of procedural due process. — U. S. at —, 102 S. Ct. 1153-59, 71 L. Ed. 2d 273-79.

The situation presented in this case is indistinguishable from *Logan* in all pertinent respects. The Tribe's cause of action for a water right for fishery purposes was not asserted or litigated by the government in the *Orr Ditch* proceedings owing to the government's conflict of interest. TCID App. A-49, A-52, A-72 to A-79, A-100, A-102, A-105 to A-106, A-107. *Logan* holds that a third party's cause of action cannot constitutionally be extinguished as a result of governmental misfeasance. *Logan* also establishes that the knowledge or lack of knowledge of the *Orr Ditch* defendants is irrelevant to the constitutional inquiry, — U. S. at —, 102 S. Ct. at 1156-57, 71 L. Ed. 2d at 276-77,[1] and that post-deprivation remedies are constitutionally inadequate, — U. S. —, 102 S. Ct. at 1158-59, 71 L. Ed. 2d at 278-79.

The second decision is *Kremer v. Chemical Construction Company*, — U. S. —, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (No. 80-6045, May 17, 1982), in which all members of the Court expressed their agreement with the principle that neither res judicata nor collateral estoppel can be applied when the party against whom the earlier decision is

---

[1]The only conceivable distinction between this case and *Logan* is that the State agency's failure to convene the fact-finding conference within the statutory period was "[a]pparently inadverten[t]," — U. S. at —, 102 S. Ct. at 1152, 71 L. Ed. 2d at 271, whereas here the federal officials made a deliberate decision not to assert and litigate the Tribe's cause of action in the *Orr Ditch* case. *See* TCID App. A-2, A-10 to A-13, A-17 to A-18. But for due process purposes, it matters not whether the extinguishment of a cause of action is said to have occurred through governmental negligence, inadvertence, mistake, or deliberate and willful misconduct. The only relevant inquiry is whether "the aggrieved party [was granted] the opportunity to present his case and have its merits fairly judged." — U. S. at —, 102 S. Ct. at 1156, 71 L. Ed. 2d at 276.

asserted did not have a full and fair opportunity to litigate the claim or issue. — U. S. at — and n. 22 (majority opinion),—n. 11 (dissenting opinion), 102 S. Ct. at 1897 and n. 22 (majority opinion), 1905 n. 11 (dissenting opinion), 72 L. Ed. 2d at 280 and n. 22 (majority opinion), 290 n. 11 (dissenting opinion). *See* the Tribe's Cross-Petition at 10-11. *Kremer*, like *Logan*, *supra*, also stands for the proposition that the question of whether a full and fair opportunity was afforded depends on the process and procedures that are provided to the party against whom the preclusion defense is raised, not what the other parties to the litigation knew or did not know. — U. S. at —, 102 S. Ct. at 1897-99, 72 L. Ed. 2d at 280-82. *See* Tribe's Cross-Petition at 11-13.

The recent decisions in the *Logan* and *Kremer* cases underscore the constitutional defects in the lower courts' holding that the Tribe is precluded from litigating its claimed water right for fishery purposes against the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators. The Tribe's Cross-Petition should therefore be granted if the Court decides to review Nevada's (No. 81-2245) or TCID's (No. 81-2276) Petition.

II.

Denying the conditional Cross-Petition would not serve any useful purpose if either Petition is granted.

The Cross-Respondents' Briefs in Opposition do not dispute the Tribe's claim that the two major issues raised in its Cross-Petition are encompassed within the questions presented in the Petitions. Cross-Pet. at 9-10. The Tribe's arguments concerning procedural due process and identity of claims would therefore be part of this case whether or not the Cross-Petition is granted. The only effect of not granting the Cross-Petition, which is condi-

tional,[2] would be to limit the relief to which the Tribe otherwise would be entitled in the event it ultimately prevails on either of these theories.[3] Consequently, denying the Cross-Petition would not serve any valid purpose. In this connection it is significant to note that TCID, the user most affected by the Court of Appeals' disposition, did not file an opposition or other response to the Cross-Petition.

III.

The Tribe did not have a full and fair opportunity to litigate its cause of action for a water right for fishery purposes.

The Sierra Pacific Power Company contends that the Pyramid Lake Tribe is not entitled to due process protection in its dealings with the federal government. Br. at 7-8 & n. 4. No authority is cited to support an exemption from minimal Fifth Amendment due process constraints for the relationship between Indian tribes and the federal government.[4] Indeed, in *Morton v. Ruiz*, 415 U. S. 199,

---

[2]See Sup. Ct. Rules 19.5, 20.5.

[3]Even this result may not come to pass in light of the current interlocutory posture of the litigation. *See* Washington v. Fishing Vessel Ass'n., 443 U. S. 658, 672 n. 19 (1979).

[4]The cases cited by Sierra Pacific (Br. at 7-8 n. 4) do not involve situations in which the federal government appeared in litigation in a representative capacity. They do not hold or even suggest that any such actions undertaken by governmental officials fall outside the scope of the due process clause. There is certainly no apparent reason why Indian tribes should receive less due process protection then paroled convicts, uninsured motorists, or welfare recipients. *Compare* Morrisey v. Brewer, 408 U. S. 471, 485-89 (1974); Bell v. Burson, 402 U. S. 535 (1971); Goldberg v. Kelly, 397 U. S. 254, 268-71 (1970). Unlike the facts of Link v. Wabash R. R. Co., 370 U. S. 626, 633-34 (1962), *see* Sierra Pacific Br. at 11, the government's *Orr Ditch* attorneys were not voluntarily chosen by the Tribe, were not under the Tribe's control, and were subject to the Fifth Amendment's due process constraints. *See* Public Utilities Comm'n. v. Pollack, 343 U. S. 451, 461-62 (1952).

236 (1974), and *Santa Clara Pueblo v. Martinez*, 435 U. S. 49, 70 n. 30 (1978) the Court relied on the government's "overriding duty to deal fairly with Indians" in holding that the federal government could not deprive needy Indians of welfare assistance "by what amounts to unpublished ad hoc determination" and in finding that Congress must not have intended to create a cause of action against tribal officials because tribes had not been afforded an opportunity to testify concerning that aspect of the legislation. *See also, Delaware Tribal Business Committee v. Weeks*, 430 U. S. 73, 83-85 (1977); *Stephens v. Cherokee Nation*, 174 U. S. 445, 478 (1899). Nor does Sierra Pacific offer any rebuttal to the Court of Appeals' analysis which led it to conclude that the Tribe is entitled to the protection of the Fifth Amendment's Due Process Clause. TCID App. A-42 to A-45.

Nevada's major argument on the due process issue appears to be that the Tribe was afforded due process because it could have intervened in the *Orr Ditch* case but did not attempt to do so. Br. at 2-5.[5] This was not, of

---

[5]The Cross-Respondents' other arguments are without merit. There is no doubt that the due process question is "fairly included" in the question presented in the Tribe's Cross-Petition (Nevada Br. at 1-2), which asks whether the *Orr Ditch* decree can be accorded res judicata effect even though the Tribe was not a party, its claimed right was not asserted, and its nominal representative, the United States, had a disabling conflict of interest. *See* Sup. Ct. Rule 21.1. The Rule does not require the talismanic invocation of particular phrases. Procunier v. Navarette, 434 U. S. 555, 559 n. 6 (1978).

Contrary to Nevada's assertion (Br. at 2), the Court of Appeals did not decline to find that the government's representation of the Tribe's interests in *Orr Ditch* was improper or inadequate. Rather, the Court first assumed that to be the case,

(Continued on following page)

(Continued from previous page)

TCID App. A-46 to A-47, and then later in its opinion found that the government's conduct "was analogous to that of a faithless fiduciary" and that "the government compromised its duty of undivided loyalty to the Tribe," TCID App. A-48 to A-49, A-52. Even more to the point, the district court specifically found that the interests of the Pyramid Lake Tribe were knowingly sacrificed by the government in order to carry out the purposes of the Reclamation Act. TCID App. A-21 to A-22, A-77 to A-79, A-100, A-105. That court's determination that the government's lawyers nonetheless were not chargeable with an *"impermissible"* conflict of interest, TCID App. A-105 to A-106, was predicated on its holding that the Reclamation Act authorized the taking of Indian reserved water rights for the benefit of federal reclamation projects and that the federal officials were simply following Congress' directives. *See* TCID App. A-21 to A-22, A-73 to A-79. That holding was reversed by the Court of Appeals, TCID A-21 to A-29, and is not challenged in the Petitions for Certiorari.

Sierra Pacific's characterization of the 1975 judgment of the Indian Claims Commission (Br. at 16) is inaccurate and misleading. The award of damages to the Tribe "did not represent compensation for 'the loss, diminution, or taking of any water rights.'" TCID App. A-16.

Although the defendants attempted to prove at trial that recognition of the Tribe's fishery water right would have catastrophic consequences, that claim was inconsistent with their equally vehement contention that the fishery was thriving and did not need any additional water. In any event, the unsupported and exaggerated claims of total devastation urged by Reno et al. (Br. at 6) are certainly a far cry from the district court's finding that the United States and the Tribe did not meet their burden of proving that *no one* would sustain *any* harm. TCID App. A-107. They are also belied by the wasteful practices that are prevalent throughout the case area including the unmetered, flat rate water supply and distribution system in Reno and Sparks which results in "lavish" per capita consumption. NRS § 704.230; Tribe's Brief in Opposition at 3-8, 17-19. Reno et al. have no cause for concern in any event because their rights enjoy priorities senior to those of the Newlands Project and would not be affected unless and until TCID's diversions are entirely eliminated, an extremely unlikely and remote possibility. *See* Tribe's Brief in Opposition at 1-3, 19-20. Of course, the question of how much, if any, additional water is required to fulfill the Tribe's reserved water right for fishery purposes remains to be determined on remand. TCID App. A-59.

course, the basis of the Court of Appeals' decision which was predicated on the defendants' lack of knowledge of the inadequacy or impropriety of the government's representation of the Tribe's interests. TCID App. A-45 to A-47, A-68.[6]

Nevada does not cite to any decision holding or even suggesting that non-parties with full knowledge of the proceedings who fail to intervene in a case nevertheless can be bound by the resulting judgment.[7] We do not know of any such authority. *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S. 100, 108-12 (1969), and *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 115 (1918), hold

---

[6]Sierra Pacific is not correct in stating (Br. at 10 n. 10) that this finding was not challenged. The issue of whether it is clearly erroneous was raised in the Tribe's Petition for Rehearing.

[7]There may be some confusion about the knowledge that can be attributed to the Tribe. *See* Nevada's Brief at 3-5, 1a-5a. There is no doubt, however that the Tribe was never provided or personally served with constitutionally sufficient notice that its fishery water right was placed at issue and in jeopardy by *Orr Ditch* pleadings. *See* Schroeder v. City of New York, 371 U. S. 208, 214 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950).

Members of the Tribe may have had some awareness that their water rights for irrigation purposes were involved in *Orr Ditch*, but it is neither reasonable nor fair to impose a mandatory obligation on the Tribe to infer that its fishery water right was necessarily placed at issue when the Justice Department attorneys responsible for the litigation had reached the opposite conclusion. TCID App. A-11 to A-13. Indeed, the Indians were expressly assured by the Commissioner of Reclamation in 1925 that his Bureau would "carefully guard against taking any action that would impair the right of the Indians" to water for fishing. *Id.*

In addition, we note that all references to the Tribe's alleged notice of the *Orr Ditch* litigation occurred long after the trial was completed in 1921. *See* TCID App. A-9. Even properly served notice received after that time would not have satisfied the constitutional requirement that the opportunity to be heard must "be granted at a meaningful time." *See* Cross-Pet. at 11; TCID App. A-13.

that such potential intervenors are not bound. *See also, Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U. S. 102, 110, 114 (1968).[8]

The Tribe is not, of course, an ordinary potential intervenor. It is "in a state of dependency," *United States v. Rickert,* 188 U. S. 432, 442-43 (1903), "dependent [on the United States] for [its] political rights," *United States v. Kagama,* 118 U. S. 375, 383-84 (1886), and for "protection against the selfishness of others and [its] own improvidence," *Board of County Commissioners v. Seber,* 318 U. S. 705, 715 (1943). As the Court stated just two years prior to the initiation of the *Orr Ditch* litigation in *Tiger v. Western Investment Co.,* 221 U. S. 286, 310 (1911):

> We must remember . . . that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people, and to legislate concerning their property with a view to their protection as such.

See also, Oneida Indian Nation v. County of Oneida, 414 U. S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F. 2d 370 (1st Cir. 1975). Thus, even if there were circumstances under which fully competent, would-be intervenors could be foreclosed from litigating a claim or issue adjudicated in a prior case, such a rule could not be applied to Indian tribes owing to their dependent status and "presumed helplessness."[9] *Cf. Ewert v. Bluejacket,* 259 U. S. 129, 138 (1922).[10]

---

[8] Although the district court found that the Tribe could have intervened, it did not discuss the legal consequences of that finding, nor did it cite any authorities upholding the res judicata defense against would-be intervenors in general or Indian tribes in particular.

[9] Joint Tribal Council, *supra,* 528 F. 2d at 380 n. 11.

[10] The Tribe's dependent legal status coupled with the facts that it was not an *Orr Ditch* party, was not served with *Orr*

(Continued on following page)

Finally, even if res judicata could be applied to would-be intervenors who are dependent upon the United States for protection, the Tribe's sovereign immunity from suit[11] precludes it from being bound because it failed to intervene. Since tribes cannot be sued without their consent, it follows that they cannot be bound by the outcome of litigation which they are privileged to avoid, nor can they be penalized for exercising that privilege. Sovereign immunity cannot be so easily circumvented. *Santa Clara, supra*, 436 U. S. at 58-59; *United States Fidelity, supra*, 309 U. S. at 513.[12]

The Tribe has no quarrel with the principle that "*once decided*," questions affecting titles to land should no longer be considered doubtful. Br. of Reno et al. at 5-6. That rule of stare decisis or collateral estoppel has no applica-

---

(Continued from previous page)
Ditch pleadings, and did not have the benefit of advice from any private attorneys with respect to the *Orr Ditch* litigation distinguishes its position from that of the fully competent, *Orr Ditch* defendants who were independently represented. Thus, contrary to Nevada's contention (Br. at 5-6), there is no inconsistency in contending that the *Orr Ditch* defendants are chargeable with knowledge of the government's conflict while the Tribe is not. *See, e. g.*, Smith v. Ayer, 101 U. S. 320, 326 (1880) ("[the law] considers the principal as affected with notice of all the facts, notice of which can be charged upon the attorney.")

[11]See, e. g., Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58-59 (1978); United States v. United States Fidelity & Guarantee Co., 309 U. S. 506, 512-13 (1940).

[12]Though Indian tribes are immune from suit, Congress has the authority to waive it. Santa Clara, *supra*, 436 U. S. at 58. In addition, tribes are subject to suit by the United States. *See, e. g.*, United States v. Winnebago Tribe of Indians, 542 F. 2d 1002 (8th Cir. 1976); United States v. Blackfeet Tribe, 364 F. Supp. 192, 369 F. Supp. 562 (D. Mont. 1973). *Cf.* United States v. Minnesota, 270 U. S. 181, 194-95 (1926); United States v. Texas, 143 U. S. 621, 642-46 (1892) (States are subject to suit by the United States). Thus, the parade of horribles postulated by Nevada (Br. at 8) is an illusion. *See also*, New Mexico v. Aamodt, 537 F. 2d 1102, 1106-07 (10th Cir. 1976), *cert. denied*, 429 U. S. 1121.

tion to this case, however, since the Tribe's claimed fishery water right was neither asserted nor actually decided in the *Orr Ditch* case. TCID App. A-2, A-55, A-104. Reliance on an expressly resolved claim is to be distinguished from giving undue weight to an omission that might or might not be held to be an inherent part of a party's cause of action. *See KVOS v. Associated Press*, 299 U. S. 269, 279 (1936) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") The determination as to whether claims are duplicative "is not a matter of precision nor subject to the application of any mechanical formula." *Expert Electric, Inc. v. Levine*, 554 F. 2d 1227, 1234 (2d Cir. 1977), *cert. denied*, 434 U. S. 903; *Ross v. Int'l. Broth. of Electric Workers*, 634 F. 2d 453, 458 (9th Cir. 1980).

CONCLUSION

For the reasons set forth in the Tribe's Cross-Petition and this Reply Brief, the Cross-Petition should be granted if the Court grants Nevada's (No. 81-2245) or TCID's (No. 81-2276) Petition for Certiorari.

Respectfully submitted,

Robert S. Pelcyger
Fredericks & Pelcyger
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 443-1683

Scott B. McElroy
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Michael R. Thorp
Eisenhower, Carlson,
Newlands, Reha, Henriot
& Quinn
1200 First Interstate Plaza
Tacoma, Washington 98402
(206) 572-4500

Attorneys for Cross-Petitioner Pyramid Lake Paiute Tribe of Indians

September, 1982

No. 82-38-CFX
Status: GRANTED

Title: Pyramid Lake Paiute Tribe of Indians, Petitioner
v.
Truckee-Carson Irrigation District, et al.

Docketed:
July 9, 1982

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
81-2276
81-2245

Counsel for petitioner: Pelcyger, Robert S.

Counsel for respondent: Solicitor General, Bryan, Richard H., Girard, Frederick G., Elliott, Steven P., Prettyman Jr., E. Barrett, Blakey, Richard W., Gray, Leslie B., Test, Louis S., Pelcyger, Robert S.

Entry	Date	Note	Proceedings and Orders
1	Jul 9 1982	G	Petition for writ of certiorari filed.
3	Aug 2 1982		Order extending time to file response to petition until August 24, 1982.
4	Aug 24 1982		Brief of respondent Nevada in opposition filed.
5	Aug 24 1982		Brief of respondent City of Reno, et al in opposition filed.
6	Aug 25 1982		Brief of respondent Sierra Pacific Power Co. in opposition filed.
7	Sep 1 1982		DISTRIBUTED. September 27, 1982
8	Sep 13 1982	X	Reply brief of petitioner Pyramid Lake Paiute filed.
10	Oct 12 1982		REDISTRIBUTED. October 15, 1982
11	Oct 12 1982		Petition GRANTED. This case is consolidated with Nos. 81-2245 and 81-2276 and a total of one hour is allotted for oral argument.
			**********
12	Nov 3 1982		Order extending time to file joint appendix and petitioner's brief on the merits until December 16, 1982.
13	Nov 5 1982	G	Motion of petitioners for divided argument filed.
14	Nov 15 1982		Motion of petitioners for divided argument GRANTED.
15	Dec 16 1982		Brief amicus curiae of State of New Mexico filed. VIDED.
16	Dec 16 1982		Joint appendix filed. VIDED.
17	Dec 18 1982		Brief of petitioner Pyramid Lake Paiute Tribe of Indians filed. VIDED.
18	Dec 18 1982		Brief amicus curiae of Yakima Valley Canal Co., et al filed.
19	Dec 20 1982		Brief amicus curiae of State of Washington & State of Idaho filed.
20	Dec 16 1982		Brief amicus curiae of Alabama, et al. filed. VIDED.
21	Dec 16 1982		Brief amicus curiae of Arizona, et al. filed. VIDED.
22	Dec 21 1982		Brief amicus curiae of Salt River Project Agricultural Improvement Assoc. etc. filed. VIDED.
23	Jan 6 1983	G	Motion of the Solicitor General for divided argument filed.
24	Jan 17 1983		Motion of the Solicitor General for divided argument GRANTED.
26	Jan 14 1983		Order extending time to file brief of respondent on the merits until February 11, 1983.
27	Jan 14 1983		Brief amicus curiae of City of Los Angeles, et al., filed.

No. 82-38-CFX

Entry	Date	Note	Proceedings and Orders
			VIDED.
28	Jan 5 1983		Record filed.
29	Jan 5 1983		Certified original record & C.A. proceedings, 22 boxes received. 2nd additional box received Jan. 6, 1983.
30	Feb 8 1983		Order further extending time to file brief of respondent on the merits until February 25, 1983.
31	Feb 14 1983		Brief amicus curiae of Sierra Club, et al. filed. VIDED.
32	Feb 24 1983		Brief of respondent Truckee-Carson Irrigatn. Dist. filed.
33	Feb 25 1983		Brief of respondent City of Reno filed.
34	Feb 28 1983		Brief of respondent Pyramid Lake Paiute Tribe of Indians filed. VIDED.
35	Feb 28 1983		Brief of respondent Sierra Pacific Power Co. filed. VIDED.
36	Feb 28 1983		Brief amicus curiae of Hoopa Valley Tribe, et al. filed. VIDED.
37	Feb 25 1983		Brief of respondent State of Nevaca filed.
38	Mar 2 1983		Brief of respondent United States filed. VIDED.
39	Mar 10 1983		CIRCULATED.
40	Mar 24 1983		SET FOR ARGUMENT. Wednesday, April 27, 1983. (4th case) The case is consolidated with Nos. 81-2245 & 2276.
41	Apr 8 1983	X	Reply brief of petitioner State of Nevada filed. VIDED.
42	Apr 23 1983	G	Motion of Pyramid Lake Paiute Tribe of Indians for leave to file reply brief out-of-time filed.
43	Apr 25 1983		DISTRIBUTED. April 29, 1983. (Motion for leave to file reply brief out-of-time.)
44	Apr 27 1983		ARGUED.
45	May 2 1983		Motion of Pyramid Lake Paiute Tribe of Indians for leave to file reply brief out-of-time GRANTED.